



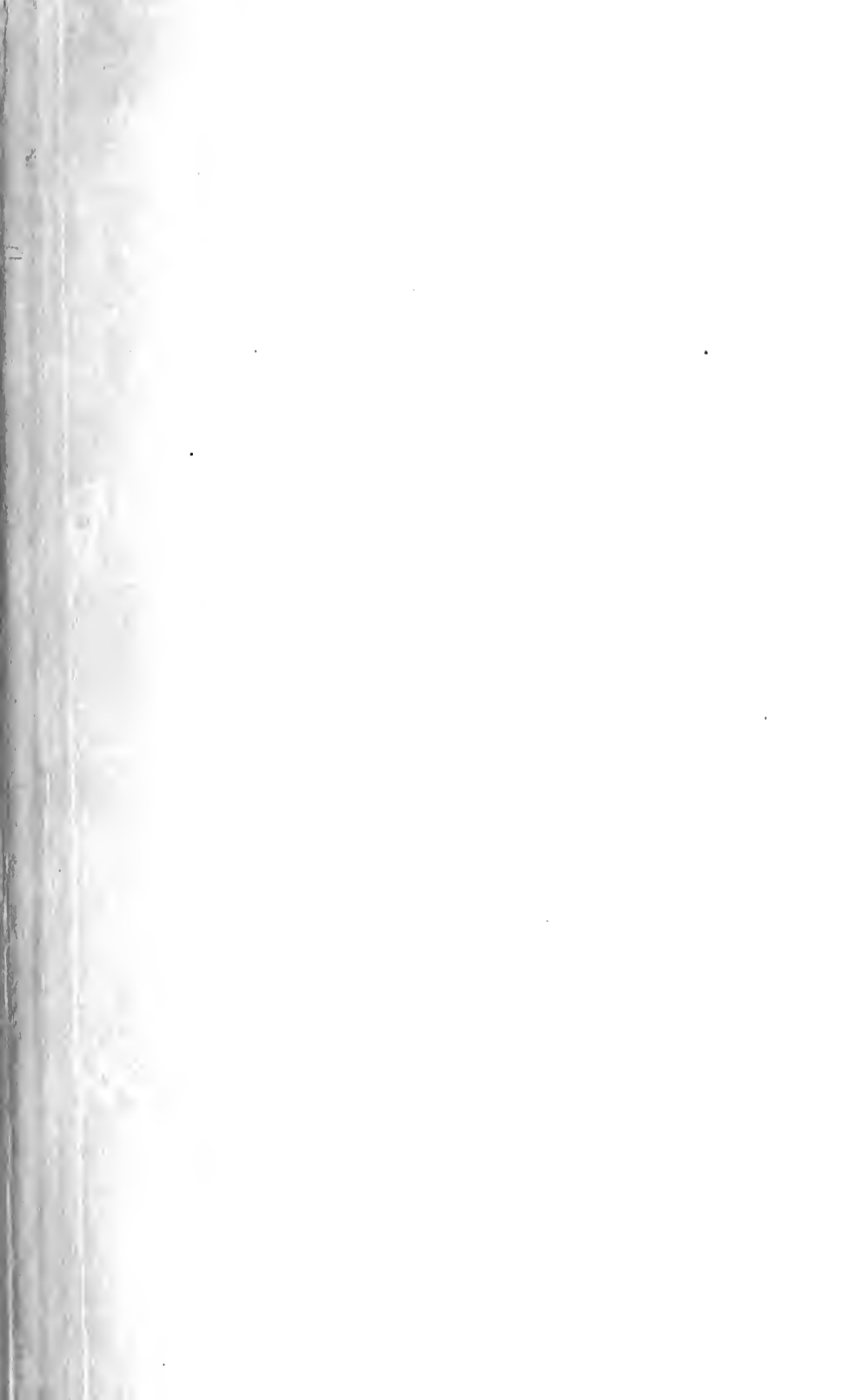
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No. 10000

United States

Vol 2305

Circuit Court of Appeals

For the Ninth Circuit.

RUDOLPH LENSCH and PAUL LEDER,
Appellants,
vs.

METALLIZING COMPANY OF AMERICA, a
corporation, L. E. KUNKLER, CHARLES
BOYDEN and JOSEPH GOSSNER,
Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 428

Vol 2 missing

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District Court of the United States for the Southern
District of California, Central Division

No. 201-J Civil

RUDOLPH LENSCH and PAUL LEDER,
Plaintiffs,

vs.

METALLIZING COMPANY OF AMERICA, a
corporation, L. E. KUNKLER, CHARLES
BOYDEN, JOSEPH GOSSNER, DOE COM-
PANY, a corporation, BLACK COMPANY,
a corporation, DOE ONE, DOE TWO, DOE
THREE, DOE FOUR, DOE FIVE, DOESIX,
DOE SEVEN and DOE EIGHT,

Defendants.

COMPLAINT

To: The Honorable the Judges of the District Court
of the United States, for the Southern District
of California, Central Division:

Rudolph Lensch of the City and County of Los Angeles, and Paul Leder of the City of Alhambra, County of Los Angeles, and State of California, plaintiffs, bring this, their Bill of Complaint, against Metallizing Company of America, a corporation, L. E. Kunkler, Charles Boyden, Joseph Gossner, Doe Company, a corporation, Black Company, a corporation, Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven and Doe Eight, defendants, and complain and say that:

I.

The jurisdiction of the Court depends upon the provisions of the Revised Statutes of the United States respecting infringement of Letters Patent for inventions.

II.

This is a suit in equity for infringement of U. S. Letters Patent No. 2,096,119, for improvements in Metal Spray gun, issued to Rudolph Lensch and Paul Leder, the plaintiffs, on [1*] October 19, 1937, and for an injunction and an accounting for damages and profits.

III.

The plaintiffs, Rudolph Lensch, a citizen of the United States, and Paul Leder, a citizen of Germany, both residing in the County of Los Angeles, State of California, and whose post office addresses are respectively, 365 North Avenue 52, Los Angeles, California, and 16 Aurora Terrace, Alhambra, Cali-

*Page numbering appearing at foot of page of original certified Transcript of Record.

fornia, are the patentees and owners of the patent in suit.

The defendant, Metallizing Company of America is a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California, and the defendant L. E. Kunkler is President and defendants Charles Boyden and Joseph Gossner are Vice-Presidents of the Metallizing Company of America.

The plaintiffs respectfully ask leave of this Honorable Court to substitute herein the true names of the defendants Doe Company, a corporation, Black Company, a corporation, Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven and Doe Eight, when information relative to the corporate identity of said Doe Company and Black Company and the capacities of the respective Doe defendants is ascertained.

IV.

Rudolph Lensch and Paul Leder, being residents of California, in the United States of America, and being within the meaning of the statutes of the United States, the first, original and joint inventors of certain improvements in metal spray guns, and being entitled to a patent therefor under the provisions of said statutes, duly applied on April 13th, 1936, to the Commissioner of Patents of the United States for Letters Patent for said improve-

ments, which were not known or used by others in this or any foreign country before their discovery or invention thereof, [2] and were not patented or described in any printed publication in this or any foreign country before their invention or discovery thereof, for more than two years prior to said application for patent, and not in public use or on sale in this country for more than two years prior to said application and not abandoned to the public, and that said invention has not been patented nor caused to be patented by said inventors, or by their legal representatives or assigns in any country foreign to the United States of America upon an application filed more than twelve months prior to the filing date of said application for United States Letters Patent.

That all the requirements of the statutes having been complied with, there were under date of October 19, 1937, duly granted and issued to the said Rudolph Lensch and Paul Leder, Letters Patent of the United States, No. 2,096,119, whereby there was secured to the said Rudolph Lensch and Paul Leder, their legal representatives and assigns for the term of seventeen years from October 19th, 1937, the exclusive right to make, use and sell said improvements, as will duly appear by said Letters Patent, profert of which is now made, and a Patent Office copy of which is marked Exhibit "A", and by reference made a part hereof, is attached to this Bill of Complaint.

V.

That the invention covered by said patent is a metal spray gun, characterized among other things by the following claims, to-wit:

2. "In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears, and wire feeding wheels, said member including housings for said turbine and gears and an open channel in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel, a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having control valves and a nozzle base, a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit, and means including an abutment between the nozzle base and the walls of said member [3] for releasably confining said units in operative association whereby said wire feeding wheels are visibly disposed in said channel.

3. "In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing housings for said turbine and gears and having an open channel in its walls between said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate

in said channel, the other of said wire feeding wheels being pivotally mounted on said member and adapted for rotation in said channel, and means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire.

4. "A wire feeding mechanism for a metal spray gun comprising a member having a turbine, transmission gears, and a pair of wire feeding wheels, means for effecting the visible feed of wire through said wheels comprising: an open channel in the walls of said member between the turbine and gear housings thereof, a wire feeding wheel mounted between the sides of said channel and actuated by said transmission gears, a wire feeding wheel hingedly mounted on said member and adapted for rotation in said channel, and a spring latch for holding said hingedly mounted wire feeding wheel in engagement with said first wire feeding wheel during the feeding of wire."

VI.

That the plaintiffs, Rudolph Lensch and Paul Leder, are and have at all times since its issue been the owners of said patent.

VII.

That plaintiffs have engaged at considerable effort and substantial expense in the manufacture and sale of metal spray guns embodying the inven-

tion of the patent in suit and have built up a considerable business with such manufacture and sale.

VIII.

That since the issue of the patent in suit, the plaintiffs have marked metal spray guns sold by them with the number of said patent.

IX.

That upon information and belief since the issuance of said letters patent as aforesaid, and within the six years last past within the Southern District of California, and elsewhere in the [4] United States of America, defendants, well knowing the premises and the rights and privileges granted and secured to plaintiffs by said Letters Patent and with the intent to injure and deprive plaintiffs of the profits, privileges and advantages accruing to plaintiffs by virtue of said Letters Patent, wilfully, wrongfully, and unlawfully manufactured or caused to be manufactured, sold or caused to be sold, and used or caused to be used, and now is using or causing to be used, devices containing the invention of said Letters Patent in suit and each of them, and in infringement of said Letters Patent in suit.

X.

That by reason of said unlawful and infringing acts of said defendants, plaintiffs have suffered great damage and injury and as plaintiffs are informed and believe, and therefore allege, defendants have realized profits and advantages, the

amounts of which damages, gains, profits, and advantages are unknown to plaintiffs and can be ascertained only by an accounting.

XII.

That the defendants were fully notified of their infringement of the said Letters Patent of the United States aforesaid and were requested to desist therefrom, but that defendants have disregarded such notice and have refused and now continue to refuse to desist from the said infringement of said Letters Patent in suit.

XIII.

That plaintiffs are informed and believe, and therefore allege that defendants intend and threaten to continue to make, sell and use and/or cause other to make, sell and use devices embodying the invention of said Letters Patent aforesaid in infringement of the said Letters Patent aforesaid, and will so continue to do unless restrained therefrom by this Honorable Court; and that unless defendants are so restrained, plaintiffs will suffer great and [5] irreparable damage and injury, for which there is no speedy and adequate remedy at law.

Wherefore, plaintiffs pray:

1. That a decree be entered adjudging plaintiffs' Letters Patent No. 2,096,119 to be good and valid and owned by the plaintiffs and to have been infringed by the defendants.

2. That the defendants, their officers, agents, servants, employees, associates, workmen, attorneys,

and those in active concert or participating with them, and each of them, be perpetually enjoined from further infringing upon the plaintiffs' said Letters Patent and upon the rights of the plaintiffs thereunder.

3. That a temporary injunction be issued to the same purport, tenor, and effect as the perpetual injunction hereinbefore prayed for.

4. That the defendants be required to account and pay the plaintiffs defendants' profits and the damages to plaintiffs from and by reason of the infringement aforesaid, and a sum in excess thereof not to exceed three times the actual damages and profits.

5. That the defendants be required to pay the costs and disbursements of the plaintiffs in this suit.

6. That plaintiffs have such other and further relief in the premises as to the Court may appear proper and agreeable to equity.

RUDOLPH LENSCH

PAUL LEDER

Plaintiffs

AVERY M. BLOUNT

Attorney for Plaintiffs [6]

State of California,
County of Los Angeles—ss.

Rudolph Lensch, being by me first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and

that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

RUDOLPH LENSCH

Subscribed and Sworn to before me this 11 day of January, 1939.

[Seal]

O. G. KEIPER

Notary Public in and for said
County and State.

EXHIBIT "A"

(Copy of Letters Patent attached, No. 2,096,-
116, introduced in evidence as Plaintiff's Ex-
hibit No. 1)

[Endorsed]: Filed Jan. 13, 1939. [7]

[Title of District Court and Cause.]

ANSWER

To the Honorable Judges of said Court:

Come now defendants Metallizing Company of America, a corporation, L. E. Kunkler and Charles Boyden, and for answer to the Complaint filed herein, allege as follows, to-wit:

I.

Said defendants admit the allegations set forth in paragraph I of said Complaint.

II.

Said defendants admit that this is a suit charging infringement of Letters Patent No. 2,096,119, for alleged improvements in Metal Spray Guns, issued to Rudolph Lensch and Paul Leder, the plaintiffs, on October 19, 1937, but deny that this is a suit in equity under the new Rules of Civil Procedure.

III.

Said defendants deny the allegations in the first section of paragraph III of said Complaint; admit the allegations in the second section of paragraph III as to the Metallizing Company of America, L. E. Kunkler and Charles Boyden, only; and make no answer for any other persons named as defendants in said Complaint, or as to the last section of paragraph III thereof.

IV.

Said defendants Metallizing Company of America, L. E. Kunkler and Charles Boyden, in answer to paragraph IV of said Complaint, deny that Rudolph Lensch and Paul Leder are or were the first, original "and sole" (or joint) inventors of the alleged improve- [9] ments in metal spray guns, or any inventors or discoverers thereof; and deny that they were entitled to a patent therefor under the provisions of the statutes of the United States, but admit that they made application on April 13th, 1936, to the Commissioner of Patents of the United States for letters patent for said alleged improvements, and deny that such alleged improvements

were not known or used by others in this or any foreign country before their alleged invention or discovery thereof; and deny that said alleged improvements were not patented or described in any printed publication in this or any foreign country before their alleged invention or discovery thereof, or for more than two years prior to said alleged application for patent; and deny that said alleged improvements were not in public use or on sale in this country for more than two years prior to said alleged application; and deny that said alleged invention had not been abandoned to the public.

Said defendants have no knowledge as to whether said alleged inventors, plaintiffs herein, have not patented or caused to be patented said alleged invention in any foreign country more than twelve months prior to the filing of said alleged application in the United States Patent Office.

Said defendants deny that all the requirements of the statutes of the United States were complied with, but admit that under date October 19, 1937, there were issued to Rudolph Lensch and Paul Leder, letters patent of the United States No. 2,096,119, for said alleged improvements, but deny that there was secured to said patentees, their legal representatives and assigns, or to anyone, for the term of seventeen years, or for any term whatsoever, the exclusive, or any, right to make, use and sell said alleged improvements as set forth in said alleged letters patent. [10]

V.

Said defendants deny that the claims set forth in paragraph V of said complaint cover said alleged invention, or that said claims are good and valid; and deny that said claims give to plaintiffs any right or claim of infringement chargeable to said defendants.

VI.

Said defendants have no knowledge or information about the allegations set forth in paragraph VI of said complaint and therefore deny the same, and leave plaintiffs to their proof thereof.

VII.

Said defendants deny each and every of the allegations set forth in paragraph VII of said complaint, and call upon plaintiffs to make full proof thereof.

VIII.

Said defendants deny the allegation set forth in paragraph VIII of said complaint.

IX.

Said defendants deny each and every allegations set forth in paragraph IX of said complaint, and deny that they have since the issuance of said letters patent, and within the six years last past within the District of California, or elsewhere, in the United States, and with intent to injure and deprive plaintiffs of profits, privileges and advantages alleged as accruing to plaintiffs by virtue of said letters patent, wilfully, wrongfully, and un-

lawfully, or at all, manufactured, or caused to be manufactured, and used, or caused to be used, or that they are now using or causing to be used, any devices containing the alleged inventions of said letters patent in suit, or infringement of said letters patent.

X.

Said defendants deny that by reason of said alleged unlawful and infringing acts, or of any acts whatsoever, plaintiffs have suffered great damages and injury, or any damage or injury whatsoever, and deny that said defendants have realized profits and advantages of any kind whatsoever from any wrongdoing or alleged infringement of said alleged letters patent. [11]

No Paragraph XI.

XII.

Said defendants deny that they were fully notified of any alleged infringement of said alleged letters patent sued on, and deny that they were requested to desist therefrom, and deny that said defendants have disregarded such alleged notice and deny that they have refused or that they now continue to refuse to desist from any said alleged infringement of said alleged letters patent.

XIII.

Said defendants deny that they intend, or that they threaten to continue to make and use and/or cause others to make and use any devices embody-

ing the alleged invention of said letters patent, or in infringement of the said letters patent, and deny that they will continue to do so unless restrained therefrom by this Honorable Court; and deny that unless said defendants are restrained, plaintiffs will suffer great and irreparable damage and injury, or any damage or injury whatsoever.

Further and Separate Defenses.

XIV.

For a first, further and separate answer and defense, said defendants allege that by reason of the state of the prior art existing at the time of said alleged invention by the said Rudolph Lensch and Paul Reder, the alleged invention in Metal Spray Guns, as presented in letters patent No. 2,096,119, was not an invention and did not require or involve the exercise of any invention or inventive faculty for its production, but that said alleged invention and all the essential parts and features and functions thereof have been known to the public generally, and particularly to the trade, for many years, and long prior to April 13, 1936, and that only ordinary mechanical skill, and not invention, was required to produce said alleged invention, and particularly as set forth in said claims 2, 3 and 4 of said letters patent and in said complaint. [12]

XV.

For a second further and separate answer and defense, said defendants allege that said Rudolph

Lensch and Paul Leder were not the original, first “and sole” (or joint) inventors or discoverers of any material or substantial part of the alleged invention described and claimed in said letters patent No. 2,096,119; but that long prior to the alleged invention thereof by said Rudolph Lensch and Paul Leder, the alleged invention and every material and substantial part thereof had been known and shown, described and patented by others in and by the following letters patent issued in other countries and in the United States of America, as follows, to-wit:

French patent No. 741,740, December 13, 1932;

French patent No. 680,554, January 22, 1930;

French patent No. 639,039, March 5, 1928;

British patent No. 268,431, March 31, 1927;

British patent No. 440,248, Dec. 23, 1935;

U. S. patent No. 2,102,395, Dec. 14, 1937, filed May 12, 1934; to Valentine;

U. S. patent No. 1,917,523, July 11, 1933, to Irons;

U. S. patent No. 1,987,016, Jan. 8, 1935, to Lensch et al.

U. S. patent No. 1,128,175, Feb. 9, 1915, to Morf;

U. S. patent No. 1,617,166, Feb. 8, 1927, to Schoop;

and other and further prior patents and publications and disclosures, for which diligent search is being made, and it is requested that the same, when

discovered, may be included in the foregoing list of prior disclosures of said alleged invention.

XVI.

For a third further and separate answer and defense, said defendants call attention to the fact that the claims set forth in said complaint all included therein, in order to secure the allowance thereof by the patent office the structure and arrangement which provides an "open channel" and makes possible a "visible feed" of the wire through said spray gun, and in the arguments made to persuade the Examiner to allow said claims as rewritten for that purpose, said argument sets forth these features as important and repeatedly refers to the advantages of "visible feed" [13] that is: "visible feed of the wire through the gun" by reason of the "open channel" construction; and defendants assert that this is an old feature, as shown in the prior art referred to, and furthermore, is a feature which defendants do not use in the alleged infringing device of defendants.

Wherefore, said defendants pray that the Complaint be dismissed, and they have judgment against plaintiffs, and each of them, for their costs and disbursements.

WM. R. LITZENBERG
IRVING O. BALTIMORE
Attorneys for Defendants

[Endorsed]: Filed Feb. 28, 1939. [14]

[Title of District Court and Cause.]

AMENDED ANSWER OR AMENDMENT TO
THE ANSWER.

Comes now the above-named defendants, and by leave of court first had and obtained, file this their amendment to their answer to the Bill of Complaint filed herein, by adding the following paragraph after Paragraph XVI, on pages 5 and 6, and before the prayer, as follows, to-wit:

XVII.

For a fourth further and separate answer and defense, said defendants allege that the invention of the patent sued on herein was known and used and circularized and offered for sale for more than two years prior to the filing date of the application on which said patent was issued, which filing date was April 13th 1936; namely as early as April 5th, 1934, and prior thereto, when the Metal Spray Company, by its Manager H. B. Rice, issued a circular letter "To All Distributors and Agents" calling attention to the "New Type Gun" and to the special Bulletin 500; that one of said letters was signed by and sent by said H. B. Rice, as manager of said company, to and was received by Wm. M. Britton, a dealer; and that said original letter and one of the said bulletins 500 are ready and will be offered in evidence to prove such public use and sale.

WM. R. LITZENBERG

IRVING S. BALTIMORE

Attorneys for Defendants.

[Endorsed]: Filed May 2, 1940. [15]

[Title of District Court and Cause.]

OPINION

This case was tried by the late District Judge William P. James, and, after his death, was transferred to this court. By approved stipulation, the cause is to be decided by me upon the pleadings and the testimony, oral and documentary, and the physical exhibits, received during the trial. Briefs and arguments have been supplied by counsel for each side.

The complaint, filed January 13, 1939, contains the usual allegations of patent grant, ownership, marking, notice and infringement. The patent in suit, No. 2,096,119, for a metal spray gun was applied for April 13, 1936, and was issued to plaintiffs as co-inventors on October 19, 1937. The invention of the patent sued on is alleged to provide "certain new and novel features and advantages beyond the improvements in metal spraying devices as set out in United States Letters patent granted to (plaintiffs) Lensch and Leder, January 8, 1935, on application filed August 29, 1932." The complaint prays for an accounting of profits and damages, triple damages, costs, and a permanent injunction.

The principal issues raised by the pleadings are those of [17] validity and infringement. In respect of validity, defendants' answer sets up certain special defenses, such as want of invention, want of novelty, and anticipation resulting from the publication of certain domestic and foreign patents.

During the trial, defendants offered proof pertaining to certain statutory defenses which had not been pleaded. The court permitted defendants to file an amendment to the answer, wherein it was then alleged that the invention of the patent in suit was "known and used and circularized and offered for sale for more than two years prior to the filing date of the application on which said patent was issued." No prior publication was specifically alleged.

The patent in suit relates to a metal spray gun consisting of two principal parts—a power unit and a combustion unit. Through the use of this tool, metal in the form of wire is reduced to a molten state by means of acetylene gas and oxygen. Knurled wheels, located in an open channel between the walls of the turbine housing and the transmission housing, deliver the wire. This molten metal, fed in a continuous stream through the nozzle of the gun, is then seized upon by an air blast which tends to atomize the metal. The air is, of course, delivered separately from the gas and oxygen. The atoms or particles of molten metal are microscopic in size after leaving the nozzle of the gun and are in a thoroughly molten state when they impinge upon the surface to be sprayed. The velocity of the plaintiff's spray gun at the nozzle is approximately forty thousand feet per minute. The power unit and the combustion unit are releasably associated at an abutment between the nozzle base of the combustion unit and the walls of the power unit casting.

The claims of the patent relied upon by plaintiffs are as follows:

“2. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears, and wire [18] feeding wheels, said member including housings for said turbine and gears and an open channel in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel, a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having control valves and a nozzle base, a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit, and means including an abutment between the nozzle base and the walls of said member for releasably confining said units in operative association whereby said wire feeding wheels are visibly disposed in said channel.

“3. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing housings for said turbine and gears and having an open channel in its walls between said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate in said channel, the other of said wire feeding wheels being pivotally mounted on said member

and adapted for rotation in said channel, and means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire.

“4. A wire feeding mechanism for a metal spray gun comprising a member having a turbine, transmission gears, and a pair of wire feeding wheels, means for effecting the visible feed of wire through said wheels comprising: an open channel in the walls of said member between the turbine and gear housings thereof, a wire feeding wheel mounted between the sides of said channel and actuated by said transmission gears, a wire feeding wheel hingedly mounted on said member and adapted for rotation in said channel, and a spring latch for holding said hingedly mounted wire feeding wheel in engagement with said first wire feeding wheel during the feeding of wire.” [19]

Figures 1, 2 and 3 referred to in the patent are as follows:

(Here appear Sheet 1 and Sheet 2 of the drawings in the patent in suit, No. 2,096,119, admitted in evidence as Plaintiffs' Exhibit No. 1.) [20]

Plaintiffs contend that certain important features of their device are novel over all the prior art disclosures, and claim that the infringing device known as the “Mogul” gun is a substantial replica of their

device. This "Mogul" gun is an improvement by defendants upon an earlier gun made by them and known as the "Metallizer" gun. In support of their contention of infringement, plaintiffs point out that the alleged infringing device comprises a power unit including a wire feeding unit and a combustion unit, and that the upper wire wheel occupies the identical relationship that it does in the patented device. They urge that the upper wire wheel operates in an open channel, such as the patent discloses, and that the wire feeding is visible to the operator, which same advantage is derivable from use of the patented gun. In case of back fire, the open channel will permit the safe dissipation of accumulated gases (just as it does in the patented device.) In case of damage to the combustion unit, as in the patented structure, that unit may be removed and repaired or replaced at relatively slight expense, when compared with repairing or replacing the entire gun—which would ordinarily be necessary in case of damage to the Metallizer or to spray guns of the prior art.

Defendants, in the main, admit these statements as to their device, but challenge those relating to the "open channel" and "visibility" to the operator. They deny infringement and urge that, if plaintiffs' claims are interpreted sufficiently broadly to show infringement, they are invalid on the prior art.

Let us consider first the contention of defendants that there was a constructive abandonment of plaintiffs' alleged invention prior to the application for

letters patent. It is conceded that a patent is void if the invention covered thereby was in public use or on sale earlier than two years (under the applicable statute) before the patent application. R. S. 4886; 35 USCA Sec. 31. As to what is a public use or an offer for sale is a question of [21] fact. It has been repeatedly held that the burden of proof of an anticipation is upon the party asserting it, and that this burden must be sustained by clear and convincing evidence. *The Barbed Wire Patent*, 143 U. S. 275; *Deering v. Winona Harvester Works*, 155 U. S. 286; *Symington v. National Co.*, 250 U. S. 383; *Eibel v. Minnesota & Ontario Paper Co.*, 261 U. S. 45; *Stoody Co. v. Mills Alloys*, (Judge Sawtelle, CCA 9) 67 F. 2d 807 (20 USPQ 1). Cf. *Paraffine Companies v. McEverlast, Inc.*, (Judge Denman, CCA 9) 84 F. 2d 335. And it has also been held that abandonment must be proved in like manner. *Research Products Co. v. Tretolite Co.* (CCA 9) 106 F. 2d 530, 534; *Byrne Mfg. Co. v. American Flange & Mfg. Co.* (CCA 6) 87 F. 2d 783; *Walker on Patents*, Deller's Edition, Sec. 100.

Experimental use is never public use within the meaning of the statute, if it is conducted in good faith for the purpose of testing the qualities of the invention. *Electric Storage Battery Co. v. Shimadzu*, 307 U. S. 5; *Research Products Co. v. Tretolite Co.*, *supra*; *Walker*, Secs. 84 and 85; Meigs' "Time, the Essence of Patent Law," p. 8.

As hereinbefore indicated, it is alleged in defendants' answer that the invention in suit was "known

and used and circularized and offered for sale for more than two years," etc. It is provided, in effect, in R. S. 4886, as amended, that a patent is invalid if the alleged invention has been patented or described in any printed publication in this or any foreign country before the invention or discovery thereof or more than two years prior to the patent application. (See R. S. 4920, as amended.) Whether by "circularized" the pleader meant "published", or "offered for sale", the character of evidence required under this provision in proof thereof should be, in principle, no different from proof of anticipation or abandonment.

When these rules of law are applied to the evidence on this [22] point, we find it falls far short of the required proof, to establish that the patent invention "was known and used and circularized and offered for sale" more than two years prior to April 13, 1936, the date of the application therefor. No physical or documentary evidence of substantial probative value was supplied, and the oral testimony was contradictory and unsatisfactory. Certain it is that the testimony did not show satisfactorily that the one metal spray gun, manufactured by plaintiffs, was subjected to anything more than a private or experimental use, prior to April 13, 1934. Nor was any publication properly shown within the meaning of the statute. Granting the witnesses to be of the highest character and entirely conscientious in their desire to tell the truth, oral testimony, unsupported by exhibits or documents, tending to show use, sale,

abandonment or publication, is unsatisfactory, particularly if the oral testimony be taken after the lapse of several years. The Barbed Wire Patent, *supra*; *Deering v. Winona Harvester Works, supra*.

Defendants did not specifically plead the defense of constructive abandonment and did not comply with the statute in giving thirty days' notice thereof prior to trial. Upon the objection being raised, Judge James permitted an amendment to the answer to incorporate the defense. He then adjourned court for one day to give plaintiffs an opportunity to make the necessary preparations for meeting the additional defense. Because of our view, as herebefore expressed, on the sufficiency of the evidence, it is unnecessary for us to determine whether or not the new Federal Rules of Civil Procedure abrogate or supersede this statute. See note on Advisory Committee to Rule 8(b). See also *Oswell v. Bloomfield*, 113 F. 2d 377.

Defendants' answer sets up ten patents which are alleged to anticipate the patent in suit. Three of those are French and two are British. The foreign patents are apparently presented to show [23] the state of the art. The patents alleged to be anticipatory are as follows:

1. Morf, No. 1,128,175, Feb. 9, 1915;
2. British, No. 268,431, Mar. 31, 1927;
3. French, No. 639,039, Mar. 5, 1928;
4. French, No. 680,554, Jan. 22, 1930 (filed Dec., 1928);
5. French, No. 741,740, Dec. 13, 1932;

6. Irons, No. 1,917,523, July 11, 1933;
7. British, No. 440,248, Dec. 23, 1935;
8. Lensch and Leder, No. 1,987,016, Jan. 8, 1935;
9. Schoop, No. 1,617,166, Feb. 8, 1927;
10. Valentine, No. 2,102,395, Dec. 14, 1937.

Probably the first inventive act in the art of spraying molten metal onto a surface was described in the Morf U. S. patent issued February 9, 1915 (No. 1, supra), in which the idea of reducing metal to molten form and spraying it onto a surface was disclosed to the public; and in this patent the idea of moving a rod into intersection with burning gases, under pressure for the purpose, is also shown and explained.¹ See *Emmett v. Metals Processing Corporation* (9 CCA, April 7, 1941, No. 9461). After the invention of the general idea of converting a metal rod or wire into a spray of liquid, then engineering and mechanical skill came into play to provide different means and mechanisms for accomplishing the process or invention.

It seems to the court that the old French patent No. 680,554, filed December, 1928 (No. 4, supra), took up a large part of the possible inventive field in this art. It teaches (1) a box or body with a handle, with means therein for feeding a metal wire through the box into a gas combustion unit or nozzle mounted thereon, with means, also, for supplying the

(1) The Schoop patent No. 1,128,058 (not in evidence) issued February 9, 1915, the same date as the Morf patent, also relates to metal spraying.

combustible gases into the nozzle in order to melt the metal wire and carry it through the nozzle; (2) a turbine for driving the wire feeding gears; (3) a spring-pressed [24] upper feed wheel, bearing yieldingly on the wire in order to obtain the pressure for proper feeding; (4) a separate housing for the turbine in the box and also separate housing in the box for the turbine-driven gears; (5) a space or passageway or channel for the feed wheels and wire being moved to the nozzle.

As stated, the application for the patent sued on indicated many features as objects of the invention. Most of these were already known in the art. We think that a detailed discussion of all of the prior art patents contained in the record is not necessary. The file wrapper reveals that, in the first Patent Office action on petitioners' original application, the examiner rejected Claims 1 and 4 on the Irons patent, No. 1,917,523, issued July 11, 1933, (No. 6, *supra*); and Claims 2 and 3 on the British patent, No. 268,431 of 1927 (No. 2, *supra*). These two were the only patents considered by the Patent Office examiner. Claim 5 was rejected as drawn to an old combination.²

That the general objects of the invention set out in the patent specifications were already known in the art is also shown by some of the patents not con-

(2) Claim 6 was allowed and became Claim 1 of the amended claims. It has to do with a baffle in the nozzle base and is not involved herein.

sidered by the Patent Office, as well as the patents mentioned. The idea of "controlling the wire feed through the gun whereby any desired pressure may be exerted on the wire" is taught in Valentine patent (No. 10, *supra*), by the Irons patent (No. 6, *supra*), and by the French patent (No. 4, *supra*). The idea of providing "a hinged latch construction whereby the top feeding wheel is releasedly confined" and whereby it "can be unlatched and lifted on its hinged connection out of the way" are also shown in the old French patent (No. 4, *supra*) and in plaintiffs' old patent (No. 8, *supra*). The idea of forming "the combustion unit of the gun as a separate and distinct entity from the mechanical unit or power plant of the gun" was also old in the French patent (No. 4, *supra*), in the Metallizing gun of the defendants and in the Valentine patent (No. 10, *supra*). The idea of providing in a spray gun "a casting as an integral part which will contain the housings [25] for encompassing the gears of the transmission as well as the turbine for driving the transmission gears and to so form the casting that it will have a channel way for the feed wire, free and clear of the interiors of the gear and turbine housings" was also old in the French patent (No. 4, *supra*) and in the French gun which was received in evidence as defendants' Exhibit "N" and in the publication "El Soldador," defendants' Exhibit "O".

By amendments filed in the application, the attorney for applicants, plaintiffs herein, cancelled

Claims 1, 2, 3, 4 and 5; thereby acquiescing in the rejection of the original claims on the patents cited, and submitted Claims 2, 3 and 4 in suit, hereinbefore set out in full.

This is admittedly a patent of a secondary nature, which must be strictly construed. Walker on Patents, (Deller's Edition) Sec. 471 p. 1709 et seq. Whenever an applicant acquiesces in the rejection of his claims of a broader scope, on references cited by the Patent Office, and accepts claims of a narrower scope, he will not thereafter be permitted to seek to include, through an application of the doctrine of equivalents or otherwise, subject matter which appears to have been relinquished. *Smith v. Magic City Kennel Club*, 282 U. S. 784; *I. T. S. Rubber Co. v. Essex Co.*, 272 U. S. 429.

An examination of the original claims, as presented to the Patent Office and rejected, shows the following as to certain claims:

Claim 2. "In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and wire feeding wheels, said member having a passageway exteriorly of the gear housings thereof and the walls of said passageway providing a channel; a shaft extending from the transmission gears having a wire feeding wheel adapted to rotate in said channel, a second wire feeding wheel mounted on a hinge [26] secured to the body of said member and means for holding the said

hinged wire feeding wheel in rotatable engagement with said first wire feeding wheel.”

Claim 3. “In a metal spray gun, a unitary member comprising the power plant thereof, said member having a turbine, transmission gears and wire feeding device, a channel way in said member free and clear of the interiors of its gear chambers, said wire feeding device comprising an upper and lower wheel and each of said wheels having a gear portion and a knurled portion, said lower wheel being adapted to rotate between the walls of said channel and said upper wheel having a pivotal mounting attached to the power plant member, and means for bringing the gear portion of the upper wire feeding wheel into meshed engagement with the gear portion of the lower wire feeding wheel during the feeding of wire through the knurled portions of said wheels.”

In these claims, which were so rejected on Irons (No. 6, *supra*) and the British patent (No. 2, *supra*), the only two patents cited, the broad reference is to “a passageway exteriorly of the gear housings thereof and the walls of the said passageway providing a channel” and “a channel way.” Necessarily, there must be a space or a passageway or a channel through which the wire may pass and in which the knurled wheels may operate to feed the wire. There is nothing said in these claims, it will be noticed, about the channel being “open.” It might be

simply a chamber or a space in the form of a channel in the box or body—just as in most of the box type of spray guns in the field.

In the final Claims 2, 3 and 4, as allowed and hereinafter quoted, the following limiting structural features are shown: The reference is not to a “channel” or a “passageway” as in the original claims, but, in each instance, to an “open channel.” The final words of the single sentence of Claim 2, which apparently [27] refers to the entire claim, are: “whereby said wire feeding wheels are *visibly* disposed in said channel” (italics are the Court’s); the words “said channel,” in turn, referring back to the words “open channel.” The abutment referred to in this claim is at one side only and to this the nozzle base is attached by Screws 63. This construction makes it possible to permit the cutting away of the opposite side, leaving the space completely open for the pipes, etc. (See Figures 1, 2 and 3 of the drawings, *supra*). Claim 3 contains this limitation: “having an *open channel* in its walls *between* said housings” (italics are the Court’s). Claim 4 reads in part: “means for effecting the *visible feed* in the walls of said member *between* the turbine and gear housings thereof * * *” (italics are the Court’s). The Irons patent (No. 6, *supra*) and the British patent (No. 2 *supra*), cited by the examiner against the original claims, clearly have the features of a passageway or space or channel or channel way—whatever one chooses to call it. So do most of the devices then in the field. Hence, ap-

parently, applicants amended their application to provide for an "open channel" between the walls of the housings in the body, thus securing their patent.

Subjecting plaintiffs' Claims 2, 3 and 4, in suit, to a critical examination, we are forced to the conclusion that applicants voluntarily limited these claims so as to differentiate their structure from the references cited, their own original structure, and other devices well known in the art. Possible irregularities in wire feed—particularly with the softer metals such as lead, tin and zinc—had caused inequalities in the metal sprayed deposits, and had resulted in frequent stopping of operations for correction. Applicants proposed to afford a means whereby the wire feeding could be constantly within the operator's vision, making it possible to correct irregularities in feeding with their resultant and expensive shutdowns.

In plaintiff's gun visibility during operation is always [28] present. The wire feed wheels are visible from the rear, and the righthand side; the construction giving bearings for both ends of the shafts without using the closed box type of body. In the Mogul gun, during operations, only the outer end of the rear wire guide can be seen as it projects out of the body. From the left hand, the side of the gear wheel attached to the upper feed wheel is visible, but it is hardly possible to see either the feed wheel itself or the moving wire. Certainly it would be impractical to attempt such an observa-

tion during operations. The feeding is not visible from the righthand side and it would be impossible to operate the gun and at the same time peer down from the top or front and see the wire passing into the combustion chamber.

Practically all the guns in the art had facilities for inspection after shutdown. Most of these provided a hinged cover of the body for this purpose. Inspection, however, is one thing and observation during actual operations is quite another. The open or cutaway body of plaintiffs' gun provides that visibility which applicants apparently sought. It seems to the court that, to construe these claims as readable on defendants' device, would be to give them a construction which would render the claims invalid on the prior art.

If there be any ambiguity or if the true scope of applicants' invention is not clear, our Ninth Circuit Court of Appeals has in effect held that reference may be made to the file wrapper and arguments. *Fullerton Walnut Growers' Ass'n v. Anderson-Barngrover Mfg. Co.*, 166 F. 443, 452. See also *Lektophone Corporation v. Rola Co.*, 27 F. 2d 758, affirmed 34 F. 2d 764. This we believe to be the proper interpretation of the decision of the Supreme Court in *Keystone Driller Co. v. Northwest Engineering Corp.* (1935), 294 U. S. 42. (For a discussion of the rule in this circuit and in other circuits, see "File Wrapper Estoppel" by Vern L. Oldham in 20 *Journal of the Patent Office Society*

115 (1938) and case [29] note in 8 *George Washington Law Review* 871 (March, 1940).)

If, then, the scope of plaintiffs' claims is not entirely clear, let us see what arguments counsel for applicants used in order to persuade the examiner to allow the amended claims, after he had rejected the original claims. We quote (*Record* pp. 106-8):

“Relative to Irons, No. 1,917,523: It is desired to note that Irons does not provide for the visible feed of the wire through the gun. He does not contemplate a wire feeding mechanism other than the ‘conventional’ construction which includes the wire feeding mechanism and feed wheels in the same housing without the ability to see the wire except by shutting off the tool and opening the cover of the mechanism housing, such, for example, as the Schoop type of wire feeding mechanism as contained in a square box housing. While Irons does provide separated power and combustion units, joining them together for operation, his structure does not teach applicant that with the conventional square box gear and feed wheel housing a channel can be formed exteriorly of the walls of the mechanism housing by the abutment of the nozzle base and the gear housing for the reception of the wire feeding wheels and so that the feed wheels will be open to view and the wire passing therethrough can be observed in its feeding. This utility in a metal

spray gun is of great importance to a gun operator, particularly when inequalities in the metal sprayed deposits, due to irregularity of wire feed, require wire adjustments to be made while the gun is operating. Furthermore, the balling up of the wire, particularly with the softer metals such as lead, tin and zinc, requires expensive shut-downs and results in low output of the tool."

Then referring to the earlier patent of plaintiffs, No. 1,987,016 (No. 8, *supra*), counsel urges: [30]

"It is desired to make this patent of record in this issue, as it has a direct bearing upon the removal of the wire feeding wheels of a metal spray gun from the gear box and mechanism contained therein, whereby visible feed of the wire is occasioned and the destruction of the gears and parts of the feeding mechanism from particles of the wire cut off by the knurled feed wheels is done away with. * * *'" * * *

"The new claims herewith presented are thought to fully differentiate applicants' structure over the references cited as well as over their original structure, and favorable consideration and allowance of same is courteously asked."

Within the limits indicated, the court finds the claims of patent valid, but not infringed.

Counsel for defendants will prepare and submit, within twenty days, under Rule 8 of this court,

findings of fact and conclusions of law and form of decree, in accordance with the foregoing. Objections thereto shall be filed within ten days thereafter.

It is so ordered.

Dated: June 14th, 1941.

RALPH E. JENNEY

United States District Judge

[Endorsed]: Filed Jun. 14, 1941. [31]

District Court of the United States, Southern
District of California, Central Division

No. 201-RJ-Civil

RUDOLPH LENSCH and PAUL LEDER,
Plaintiffs,

vs.

METALLIZING COMPANY OF AMERICA, a
corporation, L. E. KUNKLER, CHARLES
BOYDEN, JOSEPH GOSSNER,
Defendants.

MINUTE ORDER

Judge Ralph E. Jenney

Tuesday, June 24, 1941.

It is hereby ordered, adjudged and decreed that the following change be made in the Decision of the Court dated June 14, 1941:

On page 18, strike out the paragraph reading as follows:

“If, as we have said, there is any question about the scope of plaintiffs’ claims, the argument of their counsel seems to make it clear.”

RALPH E. JENNEY

[Endorsed]: Filed Jun. 24, 1941. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT

The above-entitled suit was brought on to be heard by the late Judge William P. James on April 30, 1940, and trial was continued on May 2nd and 3rd, 1940; oral arguments were made and written briefs were submitted, and the case was fully submitted prior to his death. After the death of Judge James, this cause was transferred to the Hon. Ralph E. Jenney, and by approved stipulation it was to be decided by said Judge Jenney upon the pleadings and the evidence, oral and documentary, and the physical exhibits submitted during the trial. Additional written briefs were also presented to Judge Jenney by counsel for each side.

The Court has announced its decision and now makes the following

FINDINGS OF FACT:

The patent in suit, No. 2,096,119, for a metal spray gun was applied for April 13, 1936, and was

issued to plaintiffs as co-inventors on October 19, 1937.

The invention of the patent sued on was alleged to be an improvement on a prior invention of the same inventors, a patent for which was issued January 8, 1935, on an application filed August 29, 1932, which patent was a part of the prior art at the time the patent sued on was applied for.

The issues involved are those of validity and infringement.

The invention of the patent sued on relates to a metal spray gun consisting of two principal parts—a power unit and a combustion unit, wherein metal in the form of a wire is reduced to a [33] molten state by means of acetylene gas and oxygen. Knurled wheels located in an open channel, deliver the wire to the combustion unit where it is converted into atomized molten metal. The power unit and the combustion unit are releasably associated at an abutment between the nozzle base of the combustion unit and the walls of the power unit casting. The claims of the patent relied upon by plaintiffs were claims 2, 3 and 4.

The “Mogul” gun, which is defendants’ gun, alleged to infringe said claims, was also an improvement upon an earlier gun made by defendants and known as the “Metallizer” gun.

Said “Mogul” gun embodied a power unit, including a wire feeding unit, and a combustion unit, and the upper wire feeding wheel occupies the same relationship that it does in the patented gun.

Defendants' gun does not have an "open channel" or the "visibility" to the operator which plaintiffs' patented gun has.

The first inventive act in the art of spraying molten metal onto a surface was described in the Morf U. S. patent, issued February 9, 1915, in which the idea of reducing metal to molten form and spraying it onto a surface was disclosed to the public; and in this patent the idea of moving a rod into intersection with burning gas, under pressure for the purpose, is also shown and explained.

The old French patent No. 680,554, filed December, 1928, took up a large part of the possible inventive field in this art. It shows (1) a box or body with a handle, with means therein for feeding a metal wire through the box into a gas combustion unit or nozzle mounted thereon, with means, also for supplying the combustible gases into the nozzle; (2) a turbine for driving the wire feeding gears; (3) a spring-pressed upper feed wheel, bearing yieldingly on the wire in order to obtain the pressure for proper feeding; (4) a separate housing for the turbine in the box and also separate housing in the box for the turbine- [34] driven gears; (5) a space or passageway or channel for the feed wheels and wire being moved to the nozzle.

The file wrapper reveals that, in the first office action on petitioners' original application, the examiner rejected claims 1 and 4 on the Irons patent No. 1,917,523, issued July 11, 1933; and claims 2 and 3 on the British patent No. 268,431 of 1927.

Claim 5 was rejected as drawn to an old combination.

The general objects of the invention, set out in the patent specifications, were already known in the art and were also shown by some of the patents not considered by the patent office.

The idea of controlling the wire feed through the gun "whereby any desired pressure may be exerted on the wire" is shown in the Valentine patent No. 2,102,395 and in the Irons patent No. 1,917,523, and in the French patent No. 680,554.

The idea of providing "a hinged latch construction whereby it can be unlatched and lifted on its hinged connection out of the way" is also shown in the old French patent No. 680,554, and in plaintiffs' first patent.

The idea of forming "the combustion unit of a gun as a separate and distinct entity from the mechanical unit or power plant of the gun" is also old in said French patent; in the Metallizing gun of the defendants, and also in the Valentine patent.

The idea of providing in a spray gun "a casting as an integral part which will contain the housings for encompassing the gears of the transmission, as well as the turbine for driving the transmission gears, and to so form the casting that it will have a channel way for the feed wire, free and clear of the interiors of the gear and turbine housings," was also shown to be old in the French patent No. 680,554, and in the French gun which was received in evidence as defendants' Exhibit "N", and in the

publication "El Soldador," Defendants' Exhibit "O". [35]

By amendment filed in the application, the attorney for applicants, plaintiffs herein, cancelled claims 1, 2, 3, 4 and 5; thereby acquiescing in the rejection of the original claims on the patents cited, and submitted claims 2, 3 and 4 in suit.

The patent sued on is a secondary patent and must be strictly construed.

In the original claims submitted there was only a broad reference to "a passageway exteriorly of the gear housings thereof and the walls of the said passageway providing a channel" and "a channel way." There is nothing said in these rejected claims about the channel being "open".

Claims 2, 3 and 4, as allowed, contain the following limiting structural features: The reference is not to a "channel" or a "passageway" as in the original claims, but, in each instance, to an "open channel." The final words of the single sentence of claim 2, which apparently refers to the entire claim, are: "whereby said wire feeding wheels are VISIBLY disposed in said channel"; the words "said channel" in turn, referring back to the words "open channel."

The abutment referred to in claim 2 is at one side only and to this the nozzle base is attached by screws 63.

This construction makes it possible to permit the cutting away of the opposite side, leaving the space

completely open for the pipes, etc. (see Figures 1, 2 and 3 of the drawings, *supra*).

Claim 3 contains this limitation: "having an OPEN CHANNEL in its walls BETWEEN said housings.

Claim 4 reads in part: "means for effecting the VISIBLE FEED in the walls of said member BETWEEN the turbine and gear housings thereof . . ."

The Irons patent and the British patent cited by the examiner against the original claims, clearly have the features of a passageway or space or channel or channel way—whatever one chooses to call it. So do most of the devices then in the field. [36]

Applicants amended their application to provide for an "open channel" between the walls of the housings in the body, thus securing their patent.

Applicants voluntarily limited claims 2, 3 and 4 of the patent in suit so as to differentiate their structure from the references cited, including their own original patent and other devices well known in the art.

Possible irregularities in wire feed—particularly with the softer metals such as lead, tin and zinc—caused inequalities in the metal sprayed deposit, and had resulted in frequent stopping of operations for correction.

Applicants provided a means whereby the wire feeding could be constantly within the operator's vision, making it possible to correct irregularities in feeding with their resultant and expensive shut-downs.

In plaintiffs' gun visibility during operation is always present. The wire feed wheels are visible from the rear, and the righthand side; the construction giving bearings for both ends of the shafts without using the closed box type of body.

In the Mogul gun, during operation, only the outer end of the rear wire guide can be seen as it projects out of the body. From the left hand, the side of the gear wheel attached to the upper feed wheel is visible, but it is hardly possible to see either the feed wheel itself or the moving wire. It would be impractical to attempt such an observation during operation. The feeding is not visible from the righthand side and it would be impossible to operate the gun and at the same time peer down from the top or front and see the wire passing into the combustion chamber.

Practically all the guns in the art had facilities for inspection after shutdown. Most of these provided a hinged cover of the body for this purpose. Inspection, however, is one thing and observation during actual operation is quite another. [37]

The open or cutaway body of plaintiffs' gun provides that visibility which applicants apparently sought.

To construe these claims as readable on defendants' device would be to give them a construction which would render the claims invalid on the prior art.

The argument of counsel prosecuting the application on which the patent in suit issued, taken from the file wrapper, under the decision of Fullerton

Walnut Growers' Ass'n v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 452, and other decisions, makes clear any question about the scope of plaintiffs' claims.

Within the limits indicated, the court finds the claims of the patent valid, but not infringed.

CONCLUSIONS OF LAW

That the patent in suit is a secondary patent and must be strictly construed.

That the claims of the patent in suit are all limited to a construction of spray gun having an open channel to provide visibility of the feed wheels and wire during actual operation.

That to construe the claims of the patent in suit as readable on defendants' device would be to give them a construction which would render them invalid on the prior art.

That within the limits indicated, the claims of the patent sued on are valid, but not infringed by defendants' "Mogul" gun.

That defendants are entitled to judgment as prayed for.

Let judgment be entered accordingly.

Dated Jul 8, 1941.

RALPH E. JENNEY

Judge

Approved as to form:

.....
.....

Attorneys for Plaintiffs [38]

Received copy of the within Findings this 26 day of June, 1941. 1 P. M.

AVERY M. BLOUNT

Attorney for Plaintiff. [39]

[Endorsed]: Filed Jul. 9th, 1941.

In the United States District Court, Southern
District of California, Central Division

No. 201-RJ. Civil

RUDOLH LENSCH and PAUL LEDER,

Plaintiffs,

vs.

METALLIZING COMPANY OF AMERICA, a
corporation, L. E. KUNKLER, CHARLES
BOYDEN, JOSEPH GOSSNER,

Defendants.

JUDGMENT FOR DEFENDANTS.

The above-entitled suit was brought on to be heard by the late Judge William P. James on April 30, 1940, and trial was continued on May 2nd and 3rd, 1940; oral arguments were made and written briefs were submitted, and the case was fully submitted prior to his death. After the death of Judge James, this cause was transferred to the Hon. Ralph E. Jenney, and by approved stipulation it was to be decided by said Judge Jenney upon the pleadings and the evidence, oral and documentary, and the

physical exhibits submitted during the trial. Additional written briefs were also presented to Judge Jenney by counsel for each side; and the court being fully advised in the premises:

It Is Ordered, Adjudged and Decreed that plaintiffs' patent No. 2,096,119 in suit, within the limits indicated, is valid, but not infringed by defendants' "Mogul" gun, and judgment in favor of defendants is hereby made, with the dismissal of plaintiffs' action, with prejudice, with costs to defendants, including the Reporters fees.

Costs taxed at \$62.45.

Jul. 8, 1941.

RALPH E. JENNEY

Judge

Approved as to form:

.....
Attorneys for Plaintiffs.

Judgment entered July 9, 1941. Docketed July 9, 1941, Book 5, Page 842.

R. S. ZIMMERMAN, Clerk,

By R. B. CLIFTON, Deputy. [40]

Received copy of the within Judgment this 26 day of June, 1941. 1 P. M.

AVERY M. BLOUNT

Attorney for Plaintiffs. [41]

[Endorsed]: Filed July 9, 1941.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Rudolph Lensch and Paul Leder, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 9, 1941.

HERBERT A. HUEBNER

Attorney for Plaintiffs and Appellants
520 Title Insurance Building
Los Angeles, California
Telephone: MIchigan 3821

[Endorsed]: Filed & mailed copy to Wm. R. Litzenberg, Atty. for Defts. Oct. 8, 1941, R. S. Zimmerman, Clerk. [42]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Rudolph Lensch and Paul Leder, as Principals, and the National Automobile Insurance Company, a corporation organized and existing under the laws of the State of California and authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto Metallizing Company of America, a corporation, L. E. Kunkler, Charles Boyden, Joseph Gossner, et al, in the full and just sum of Two Hundred Fifty and No/100 Dollars (\$250.00) to be paid to

the said Metallizing Company of America, a corporation, L. E. Kunkler, Charles Boyden, Joseph Gossner, et al, their certain Attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of October, in the year of our Lord One Thousand Nine Hundred and Forty One.

Whereas, on July 9th, 1941 a Judgment was entered in the District Court of the United States, Southern District of California, Central Division, in the above entitled case and as the Plaintiffs, Rudolph Lensch and Paul Leder, have filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the State of California.

Now, Therefore, the condition of the above obligation is such that if Rudolph Lensch and Paul Leder, Plaintiffs, shall prosecute his appeal to effect, and answer all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

RUDOLPH LENSCH and
PAUL LEDER
By PAUL LEDER

NATIONAL AUTOMOBILE
INSURANCE COMPANY
By WILLIAM E. FORTNEY
Attorney-in-Fact

Examined and recommended for approval as provided in Rule #13.

HERBERT A. HUEBNER

This recognizance shall be deemed and construed to contain the "consent and agreement" for summary judgment and execution thereon mentioned in Rule #13 of the District Court. [43]

State of California,
County of Los Angeles—ss.

On the 6th day of October, in the year 1941, before me, Margaret Murphy, a Notary Public in and for said County and State, personally appeared William E. Fortney, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal]

MARGARET MURPHY

Notary Public in and for said County and State.

The foregoing bond is approved. Oct. 10, 1941.

RALPH E. JENNEY

Judge.

[Endorsed]: Filed Oct. 10, 1941. [44]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 52 inclusive contain full, true and correct copies of Complaint; Answer; Amendment to Answer; Order Transferring Case; Opinion and Decision; Order Amending Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond for Costs; Designation of Appellants; Designation of Appellees; Stipulation for Elimination of Certain Parts Designated; Order for Transmission of Original Exhibits; Order Extending Time to Docket Appeal; which, together with the Original Exhibits and Reporter's Transcript of Testimony and Proceedings, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for copying, comparing, correcting and certifying the foregoing record amount to \$7.85, which amount has been paid to me by Appellants.

Witness my hand and the seal of the District Court of the United States for the Southern District of California this 15th day of December, A. D. 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy. [53]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

Avery M. Blount, Esq.,
Herbert A. Huebner, Esq., and
Kelly L. Taulbee, Esq.,
For Plaintiffs.

William R. Litzenberg, Esq., and
Irving S. Baltimore, Esq.,
For Defendants.

Los Angeles, California,
Tuesday, April 30, 1940, 10 A. M.

The Court: The case of Lensch against Metallizing Company.

Mr. Huebner: The plaintiff is ready, your Honor.

Mr. Litzenberg: The defendant is ready.

The Court: You may proceed.

Mr. Blount: If your Honor please, with the permission of the court, at this time plaintiff desires to associate as counsel Mr. Herbert A. Huebner and also Mr. Kelly L. Taulbee.

The Court: The order may be made.

Mr. Huebner: In regard to the transcript, your Honor, counsel and I have not yet agreed upon what arrangement should be made. It appeared to me that the court will desire a copy, and plaintiff will desire a copy. Now, if the court does not desire a copy,

that presents a little different question, and I should like to inquire at this time about that.

The Court: Well, I make no condition as to that, except to say that if you, for instance, have a copy furnished you, that I would want to use that later. It is not going to be filed unless you so instruct, but I would like to have the use of it at the end of the case.

Mr. Huebner: It seems to me the proper way to handle this is to have the usual court's copy made, and any party [2*] that desires a copy also order it, and my suggestion is that the parties join in paying the reporter's expense initially and in furnishing the court a copy, the cost of that to be eventually taxed, and that either party, if they desire, order their own copies. I personally would like to see it come through in the form of a daily.

Mr. Litzenberg: We have not felt that there was any need for a daily, and we have not felt that perhaps the court would have need for a daily transcript. And of course we want to avoid as much expense as possible. We came here with the idea that the daily record is all we would ask for at the present time and all that we would like to have taken.

Mr. Huebner: If that is the position of the defendants and they decline to join us in providing the court with a copy, the plaintiff will provide the court with a copy.

*Page numbering appearing at top of page of original Reporter's Transcript.

The Court: Which I will not allow the other side to use.

Mr. Litzenberg: That is understood.

The Court: If you say so, the copy of the transcript that you furnish me will not be allowed to be used by the other side, either here or afterwards.

Mr. Huebner: It seems to me that if we bear the expense, that should be the understanding.

The Court: That will be the understanding.

Mr. Litzenberg: And if we wish a copy on appeal it will be necessary, of course, for us to procure that. [3]

The Court: Yes. We can't say yet which side will appeal, of course.

Mr. Huebner: May I confer with counsel for a moment?

The Court: Yes.

Mr. Huebner: I am sorry to take your Honor's time, but this was unexpected. The plaintiff will desire one copy for the court and one copy for its own use, to be turned out in the form of a daily.

The Court: At the cost of the plaintiffs, for the present?

Mr. Huebner: That is, the plaintiff will advance the cost, and in the event costs are taxed, that the reporter's per diem and the cost of the court's copy will be taxable as costs.

The Court: The per diem will. Of course you have agreed as to that. Now, do you agree that the court's copy shall be taxed as costs?

Mr. Litzenberg: No, I don't think we will agree to that.

Mr. Huebner: Very well. We will stand it then.

The Court: The per diem is the only cost, then, that is to be taxed.

Mr. Huebner: Before proceeding to the merits, I should like to ask the court's permission to make a few very minor amendments in the complaint. They do not go to the substance, but they do go to form. For instance, the [4] complaint was entitled "Bill of Complaint," and I should like to correct that and call it just "Complaint." Any objection to that, Mr. Litzenberg?

Mr. Litzenberg: None at all. I called attention to it in my answer.

Mr. Huebner: And on page 2, in paragraph 4, line 27 of that page, there is an allegation that the plaintiffs Lensch and Leder were the first, original and sole inventors, whereas the patent shows, and it is a fact, that they were joint inventors, and I should like to change the word "sole" to "joint." Any objection to that? [5]

Mr. Litzenberg: That is agreeable.

Mr. Huebner: In the last line of page 4, there is an allegation of infringement within the District of California, and I should like to specify the Southern District of California.

The Court: Very well.

Mr. Huebner: On page 5, in line numbered 7, the allegation is that the defendants unlawfully manufactured or caused to be manufactured, and

used or caused to be used, and I should like to insert after the first comma in line 7 the words "sold or caused to be sold," so that the allegation will be in the usual form of manufacture or use or sale.

The Court: Very well.

Mr. Huebner: And a similar correction should be made in paragraph number 13 on page 5, in lines 27 and 28. There should be a comma after the word "make" and insert the word "sell" in each instance.

The Court: Very well.

Mr. Huebner: The original Letters Patent is offered in evidence, and leave is asked to substitute a printed copy.

The Court: That may be done.

Mr. Huebner: I have here an extra copy for the use of the court, which he may mark up at his pleasure.

The Clerk: Plaintiff's Exhibit No. 1.



PLAINTIFFS' EXHIBIT NO. 1

Lensch Patent No. 2,096,119

[Endorsed]: No. 201-J Civil. Lensch vs. Metal-
lizing Co. Filed 4/30/40. R. S. Zimmerman, Clerk.
By L. B. Figg, Deputy Clerk.

Oct. 19, 1937.

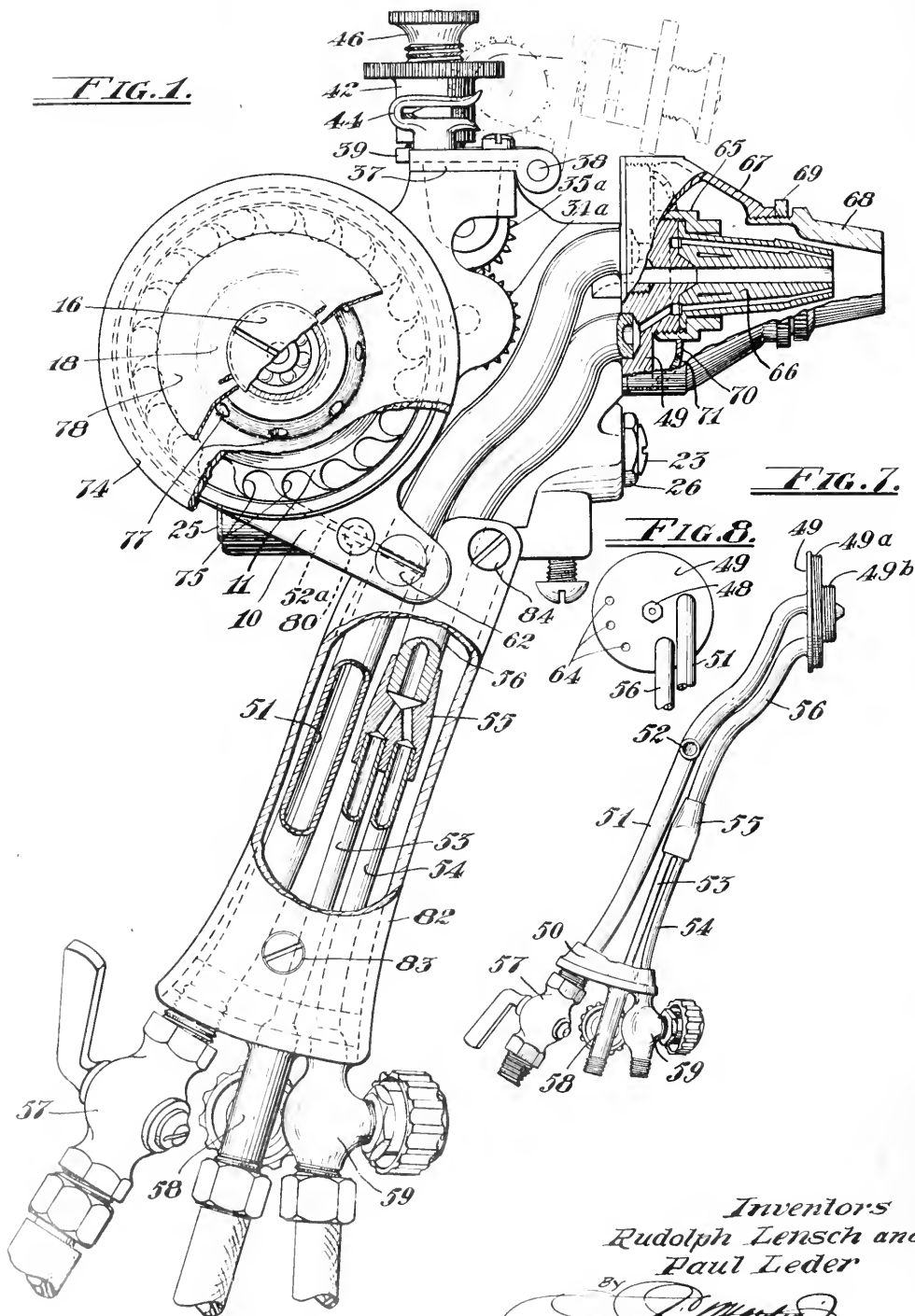
R. LENSCH ET AL

2,096,119

METAL SPRAY GUN

Filed April 13, 1936

3 Sheets-Sheet 1



Inventors
Rudolph Lensch and
Paul Leder

by *J. O. Martin*
ATTORNEY

Oct. 19, 1937.

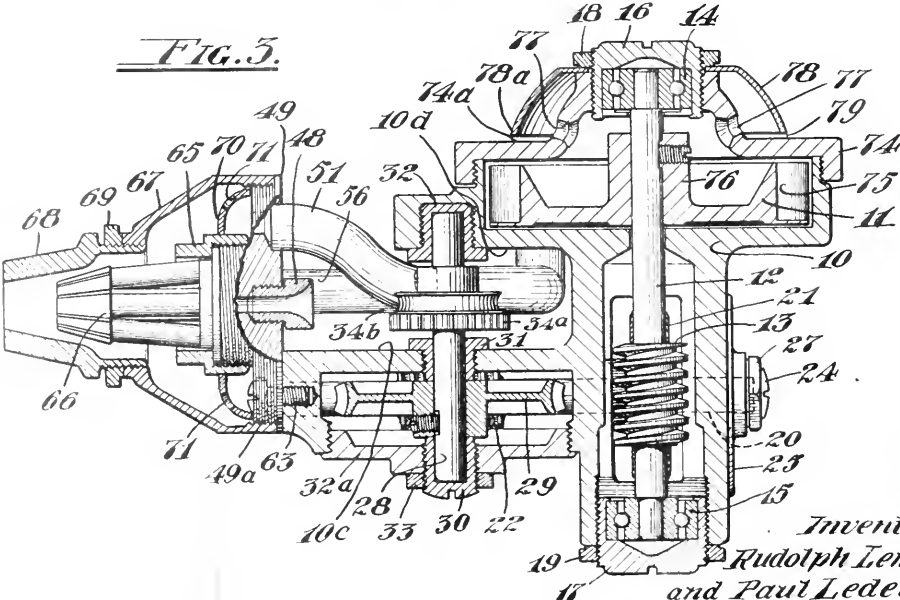
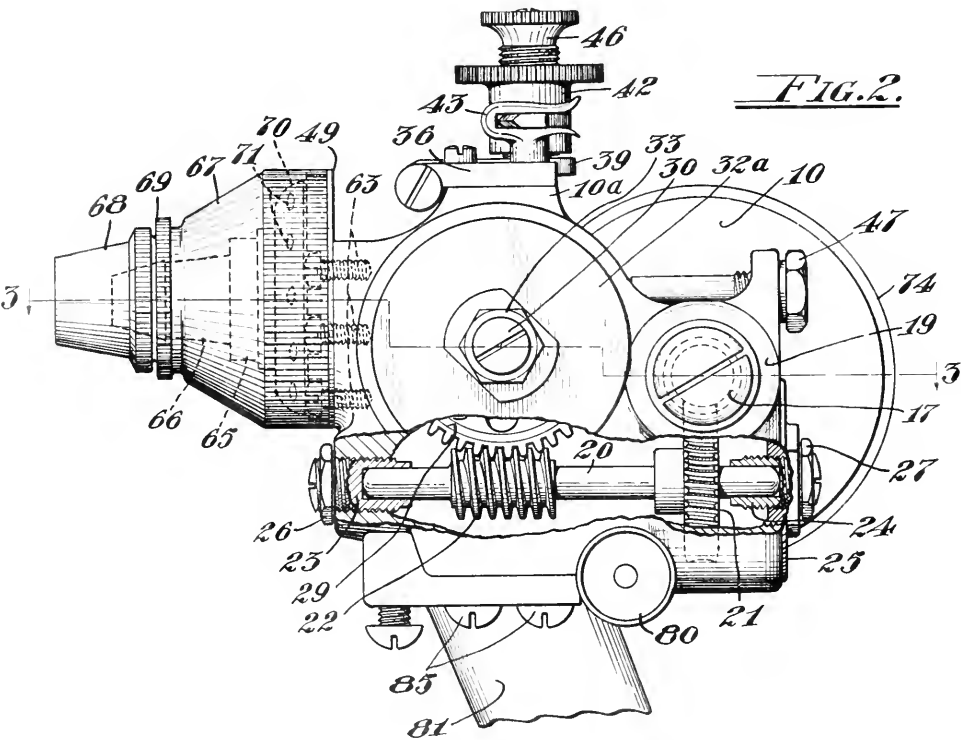
R. LENSCH ET AL

2,096,119

METAL SPRAY GUN

Filed April 13, 1936

3 Sheets-Sheet 2



Inventors
Rudolph Lensch
and Paul Leder
BY *[Signature]*
ATTORNEY

Oct. 19, 1937.

R. LENSCH ET AL

2,096,119

METAL SPRAY GUN

Filed April 13, 1936

3 Sheets-Sheet 3

FIG. 4.

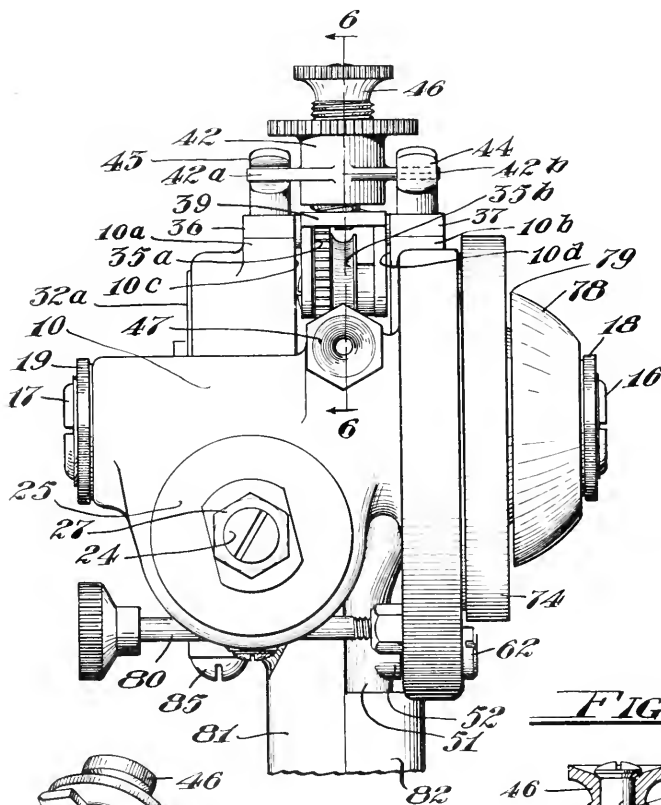
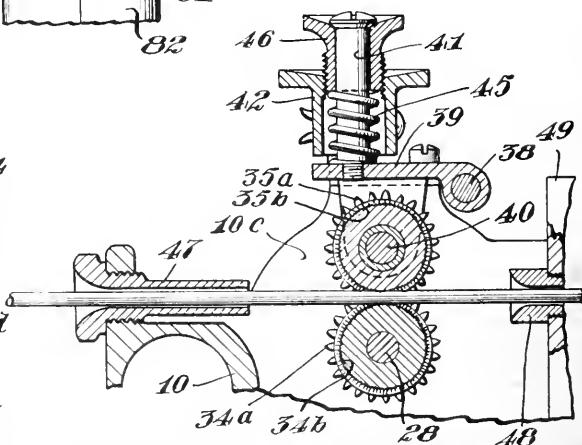
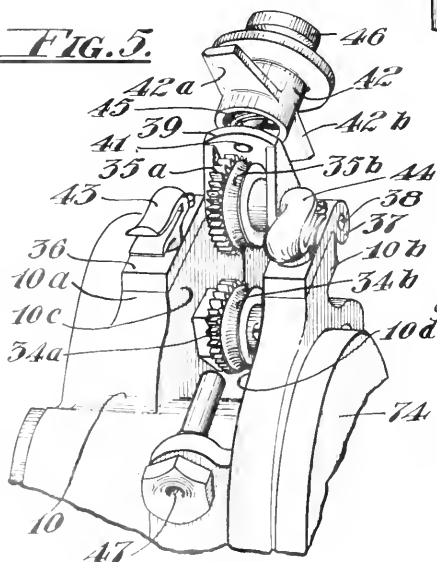


FIG. 6.

FIG. 5.



Inventors
Rudolph Lensch and
Paul Leder

By *J. M. M. M.*
ATTORNEY

UNITED STATES PATENT OFFICE

2,096,119

METAL SPRAY GUN

Rudolph Lensch, Los Angeles, and Paul Leder,
Alhambra, Calif.

Application April 13, 1936, Serial No. 74,028

4 Claims. (Cl. 91—12.2)

The hereinafter described invention relates to the spraying of molten metal, being characterized by improvements in devices for this purpose, which devices utilize gaseous fuels for melting the metal as fed through them in wire form and fluid pressure for atomizing and depositing the molten metal against a base or part to be metal coated.

Among the objects of this invention is the provision of certain new and novel features and advantages beyond the improvements in Metal spraying devices as set out in United States Letters Patent granted to Rudolph Lensch and Paul Leder, January 8, 1935, No. 1,987,016.

One of the objects of the present invention is to provide an improved arrangement of controlling the wire fed through the gun whereby any desired pressure may be exerted on the wire in its passage through the wire feeding wheels, thereby better preventing slippage of the wire and effecting through the uniformity of its feed an improved quality of the molten metal deposition.

Another object of this invention is to provide a hinged latch construction whereby the top wire feeding wheel is releasably confined so that during wire feeding it can be set to engage the wire and after or during wire feeding can be unlatched and lifted on its hinged connection out of the way.

Another object of this invention is to increase the efficiency of the power plant as employed for driving the wire feeding mechanism of the gun through improvements, (1) in the turbine used as the prime mover, and (2) in the gearing of the transmission, the housing of the transmission and the manner of setting the transmission gearing in its bearings.

A further object of this invention is to form the combustion unit of the gun as a separate and distinct entity from the the mechanical unit or power plant of the gun and to so provide conduits for carrying the fluid for atomizing the molten metal of the gun as well as the fuel for melting the metal that they will be contained in a single unit, one end of which terminates in a base to which the fuel nozzle of the gun is attached, and the opposite end of which terminates in the valve controlling means for the fluid pressure and fuel in its passage through the unit—thereby (1) condensing the space which these conduits occupy, eliminating joints subject to leakage and permitting of a construction of relatively light weight, and (2) making a construction for carrying fluid pressure and fuel which can be assembled in the gun as a

unit as well as replaced as a unit for expeditious repair.

Another object of this invention is to provide in a metal spray gun a casting as an integral part which will contain the housings for encompassing the gears of the transmission as well as the turbine for driving the transmission gears and to so form the casting that it will have a channel way for the wire feed, free and clear of the interiors of the gear and turbine housings.

Another object of our invention is to provide a new and novel way of handling the turbine exhaust, so that the exhaust will be expanded between the cover of the turbine and the turbine impeller and released through openings in the turbine cover, and after passing through these openings will be baffled to effect its discharge circumferentially, thereby effecting a greater efficiency of the turbine through the improved means of governing its exhaust.

A further object of this invention is to improve the efficiency of the combustion unit of the gun through the provision of a baffling arrangement whereby the fluid pressure for atomizing the molten metal will be better distributed around the molten metal in its discharge through the air cap at the end of the gun.

In order to more fully understand our invention reference should be made to the accompanying drawings, in which Fig. 1 is a side elevation with portions broken away and certain parts in section to better illustrate the improvements. Fig. 2 is a side elevation of the upper portion only of the structure of our invention, this view showing the side directly opposite the side of the elevation of Fig. 1. Fig. 3 is a sectional plan view taken on line 3—3, Fig. 2. Fig. 4 is a rear end elevation of the upper portion only of our improved structure. Fig. 5 is a broken perspective view of the wire feeding mechanism of our improvements. Fig. 6 also shows in sectional side elevation another view of the improved wire feeding arrangement of our structure taken on line 6—6, Fig. 4. Fig. 7 is a side elevation showing the combustion unit only of our improved gun structure, while Fig. 8 is a rear end view of the upper portion thereof.

Referring to the drawings:—Description will first be made of the power plant of our structure in which numeral 10 denotes the casting which 50 contains the chambers for housing the turbine 11, and the gear train cooperating therewith. Numeral 12 denotes the turbine shaft carrying the worm 13, this shaft being mounted in ball bearings 14 and 15. Ball bearings 14 and 15 are ad-

justably confined endwise by threaded containers 16 and 17 respectively. Containers 16 and 17 are locked in position after adjustment by lock nuts 18 and 19 respectively. Numeral 20 denotes a cross shaft substantially at right angles to turbine shaft 12. Shaft 20 carries a worm wheel 21 and a worm 22, and is mounted in bearings 23 and 24 at its opposite ends. The bearings 23 and 24 are aligned so as to bring the worm wheel 21 into meshed engagement with the worm 13 of turbine shaft 12. Shaft 20 is adjustably confined endwise through the threaded engagement of bearing 23 with casting 10 on the one end and through the threaded engagement of bearing 24 on the opposite end as provided in the gear chamber cover 25. Lock nuts 26 and 27 confine the bearings 23 and 24 respectively, in adjusted position. Numeral 28 denotes a shaft substantially at right angles to shaft 20. Shaft 28 carries a worm wheel 29, and is mounted in bearings 30, 31 and 32 so as to bring worm wheel 29 into meshed engagement with the worm 22 of shaft 20. Shaft 28 is adjustably confined endwise through the threaded engagement of bearing 30 as provided in the gear chamber cover 32a. A lock nut 33 confines the bearing 30 in adjusted position. Shaft 28, termed as the wire feed shaft, carries a wire feeding wheel comprising two portions, 34a and 34b. Portion 34a consists of a spur gear, while portion 34b consists of a grooved knurl wheel. Situated immediately over the wire feeding wheel of shaft 28 is another similar wire feeding wheel, comprising portions 35a and 35b. Portion 35a consists of a spur gear adapted to mesh with the spur gear 34a, while portion 35b consists of a knurled wheel adapted to cooperate with the knurled wheel 34b in the feeding of the wire through the gun as hereinafter described. The wire feeding wheels, comprised of the parts 34a—34b and 35a—35b are known as the lower and upper wire feeding wheels, respectively. The meshing of the gear portions of the wire feeding wheels is brought about only during the feeding of wire and through a new and novel arrangement of parts involving a latch device pivotally mounted in bearing plates 36 and 37 secured to lugs 10a and 10b of casting 10. The pivotal mounting is occasioned by a shaft 38 fitting bearings made in the plates 36 and 37. Shaft 38 carries a part 39, having depending portions containing bearings for carrying a shaft 40, upon which is mounted the upper wire feeding wheel 35a—35b. Secured to the top of part 39 by bolt 41 is a latch member 42 having wing portions 42a and 42b extending from its side. The member 42 is adapted to swivel on the bolt 41. Now, secured to the bearing plates 36 and 37, respectively, are two forked members 43 and 44. These forked members have open jaws, the jaws being set so that their open ends are opposed to each other. The jaws of members 43 and 44 are adapted to receive the wing portions 42a and 42b of latch member 42, the cooperating edges of the wings and jaws being beveled so that when the latch member 42 is swiveled in its connection a firm but releasably confined engagement of member 42 will be made in the jaws of members 43 and 44. In this latch construction it will be noted that the depending bearing portions of part 39 carrying the upper wire feeding wheel 35a—35b, are adapted to fit between the faces 10c and 10d of the main casting 10—a channel being formed between said faces of casting 10 to receive the part 39 when the latch member 42 is engaged in the forked jaws of members 43 and 44. At this time the gear portion 35a of the upper wire feeding

wheel and the gear portion 34a of the lower wire feeding wheel are brought into meshed engagement for the feeding of wire through the knurled portions 34b and 35b of the respective wire feeding wheels. A spring tension device is provided in the latch member 42 which gives the ability to the latch structure to adjust the pressure applied upon the wire in its feed through the knurled portions 34b and 35b of the lower and upper wire feeding wheels, respectively. This device comprises a spring 45 chambered in latch member 42, the upper end of member 42 being tapped to receive a spring tension adjusting screw 46.

In the drawings, Fig. 1, the latch device is shown in dotted lines swung up in the out of service position, that is, when no wire is being fed through the gun. By our improved structure the operator has a full vision of the wire, from the time of its entrance through the rear wire guide 47 and across the face of the knurled portion 34b of the lower wire feeding wheel into the front wire guide 48, before the latch member 42 is dropped down on its pivotal mounting into the channel way of the main casting 10 and its wings 42a and 42b are locked in wire feeding position in the jaws of members 43 and 44. The improved wire feeding arrangement of our structure including the latch device and channel between the sides 10c and 10d of main casting 10, for receiving the latch member 42 and upper wire feeding wheel as depended therefrom, is well shown in perspective view Fig. 5, while the sectional illustration of Fig. 6 shows the structure in functioning position during the feeding of wire.

Having described the wire feeding structure of our invention we will proceed with the description of the combustion unit thereof and in this connection reference is made particularly to Fig. 1, Figs. 7 and 8, in which Fig. 1 shows this unit assembled in place in the gun structure, and Fig. 7 shows the combustion unit formed as a separate entity ready for insertion into the gun assembly. Numeral 49 denotes the nozzle base member and numeral 50 the compressed air and fuel manifold member—these members forming the termini of the combustion unit. The compressed air used as the atomizing element for the molten metal and as power for driving the turbine of the power plant is carried by conduit 51, the threaded side outlet thereof, 52, being adapted to carry off a portion of the compressed air to the turbine impeller 11 through the passage 52a in main casting 10. Conduit 53 and conduit 54 carry respectively the oxygen and acetylene used as fuel. Conduit 53 and conduit 54 are united together by a combining chamber 55—out of which a conduit 56 leads these mixed gases. The lower ends of the conduits 51, 53 and 54 are made up in fluid tight joint engagement to manifold member 50, while the upper ends of the conduits 51 and 56 are similarly made up in joint engagement with nozzle base 49. In this structure a definite distance is maintained between the nozzle base 49 and the manifold 50 and the conduits 51, 53, 54 and 56 may all be removed and replaced in the gun assembly at one time. This makes for an efficiency in a metal spray gun not heretofore possible through the ability to expeditiously replace the combustion unit of the gun in the event of failure of the gaseous passages thereof. Numerals 57, 58 and 59 denote respectively the compressed air, oxygen and acetylene valves used for controlling the gaseous fluids of the combustion unit, the same being made up to manifold 50. Furthermore by our improved unit assembly of the fluid

carrying conduits of the gun, a more compact and simplified gun structure is effected.

In the assembly of the unit in the gun a hollow screw 62, tapped into casting 10, through which compressed air leads into passage 52a, together with the screws 63 passing through the hole 64 in nozzle base member 49 and fitting tapped holes in casting 10, hold the unit in releasably confined position in the gun assembly.

Nozzle base 49 is threaded at 49a and 49b, the thread 49b being adapted to receive a threaded union nut 65 holding the gun nozzle 66 in position. Encompassing nozzle 66 and secured to threaded end 49a of nozzle base 49 is air funnel 67. The smaller end of funnel 67 is adapted to receive the air cap 68 through threaded engagement between these respective parts. Lock nut 69 retains the air cap 68 in adjusted position in its threaded engagement with funnel 67. It will be noted that a baffle plate 70 is carried by the union nut 65. Baffle 70 is provided with a plurality of openings 71 through which the compressed air from the conduit 51 of the combustion unit is checked and deflected around the nozzle 66 and through the funnel 67 and air cap 68 in a highly efficient manner in effecting the atomization of the molten metal.

In the improved turbine structure of our invention numeral 11 denotes the turbine impeller as fixed to the turbine shaft 12. Main casting 10 is chambered to receive impeller 11, a threaded rim being provided on the impeller chamber to receive the threaded turbine cover 74. Turbine impeller 11 is provided with a cavity between the inner circumferential edge bounding its buckets 75 and its hub 76—this space providing what we choose to term the turbine impeller expansion chamber. Now in the turbine casing cover 74 and directly opposite the expansion chamber of impeller 11, is a chamber portion carrying a plurality of openings around it as denoted by numeral 77. Openings 77 are preferably of like size and inclined upwardly. Numeral 78 denotes a cup-like baffle secured to turbine cover 74 through the medium of lock nut 18 of the ball bearing container 16. Baffle 78 is set so as to provide a circumferentially extending slot 79 between its cupped edge 78a and the face 74a of turbine cover 74, thereby providing a free discharge for the air as exhausted from impeller 11 through the openings 77 of turbine casing cover 74.

From the foregoing description it will be clear that the air as exhausted from the buckets 75 of turbine impeller 11 is held a relatively long time between the chambered portions of the impeller and the turbine cover 74 before its final release to the atmosphere through the slot 79. During this time an expansion of the air is occasioned without creating undue back-pressure. By retaining the air exhausted from the turbine impeller in this manner we have found that the initial air introduced through the passage 52a against the buckets of the impeller is utilized with high efficiency and that a much less pressure of compressed air is required to drive the turbine impeller than heretofore used, for example in the turbine structure of our invention as covered by Letters Patent No. 1,987,016.

The compressed air through the passage 52a

as used for driving impeller 11 is controlled through needle valve 80.

The combustion unit of our structure is housed by the handle of the gun, the same being comprised of parts 81 and 82 removably confined by the screws 83, 84 and 85.

We desire it to be understood that reasonable modifications in the structural improvements of our invention, as shown by the illustrative embodiments herewith, may be made without departing from the spirit thereof and we therefore do not wish to restrict ourselves to the exact showing made, the scope of the invention being governed by the extent of the appended claims.

We claim:

1. In a metal spray gun, of the class described, in combination, a nozzle, a nozzle base, a union nut for securing said nozzle to the nozzle base, a baffle carried by said nut having a plurality of openings therethrough adapted to direct the flow of compressed air from said nozzle base, an air funnel encompassing said nozzle and baffle and an air cap secured to the end of said funnel.

2. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears, and wire feeding wheels, said member including housings for said turbine and gears and an open channel in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel, a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having control valves and a nozzle base, a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit, and means including an abutment between the nozzle base and the walls of said member for releasably confining said units in operative association whereby said wire feeding wheels are visibly disposed in said channel.

3. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing housings for said turbine and gears and having an open channel in its walls between said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate in said channel, the other of said wire feeding wheels being pivotally mounted on said member and adapted for rotation in said channel, and means for holding the said wire feeding wheels in co-operative engagement during the feeding of wire.

4. A wire feeding mechanism for a metal spray gun comprising a member having a turbine, transmission gears, and a pair of wire feeding wheels, means for effecting the visible feed of wire through said wheels comprising: an open channel in the walls of said member between the turbine and gear housings thereof, a wire feeding wheel mounted between the sides of said channel and actuated by said transmission gears, a wire feeding wheel hingedly mounted on said member and adapted for rotation in said channel, and a spring latch for holding said hingedly mounted wire feeding wheel in engagement with said first wire feeding wheel during the feeding of wire.

RUDOLPH LENSCH.
PAUL LEDER.

Mr. Litzenberg: Might it not be well at this time to [6] have it stipulated that regular printed copies and photostatic copies may be used in place of originals?

Mr. Huebner: Yes; that is agreeable.

The Court: Yes. [7]

Mr. Huebner: Referring to the enlargements on the blackboard of the three sheets of drawings in the patent in suit, this is Sheet No. 1, this Sheet 2 and this one Sheet 3. Without going into the details of the device, because the drawings [11] at first blush looks somewhat complicated, the structure of the patent is not at all complicated; and I will indicate in a general way the features which are interesting to the court.

Before proceeding to discuss it, Mr. Blount has suggested, and I think it is a wise suggestion, to offer in evidence these three enlarged drawings of the drawings of the patent in suit. In order to obtain the full benefit of the enlargements of the drawings, the upper part identifying the patent and the patent date and so forth are omitted, but I am sure Mr. Litzenberg, by comparison, can satisfy himself that these are correct photostats.

Mr. Litzenberg: There is no objection.

The Clerk: Plaintiff's Exhibits 2, 3 and 4. [12]

Mr. Huebner: I think if your Honor cared to examine one of the guns manufactured under the patent in suit, you would get a more comprehensive idea of the device. And I will offer in evidence one of the guns manufactured under the patent in suit.

The Clerk: Plaintiff's Exhibit No. 5. [15]

Mr. Huebner: Mr. Litzenberg, will you stipulate that this is a metallizer manufactured by the defendants?

Mr. Litzenberg: Yes.

Mr. Huebner: And do you stipulate that this drawing, which I have just hung up on the easel, is a true representation of the metallizer of the defendants? [23]

Mr. Litzenberg: It is the same.

Mr. Huebner: I offer in evidence, first, the metallizer gun.

The Clerk: Plaintiffs' Exhibit No. 6.

Mr. Huebner: And I next offer in evidence the enlarged drawing of the same gun.

The Clerk: Plaintiffs' Exhibit No. 7. [24]

Mr. Huebner: They manufactured that for awhile and, as often happens, when some new fellows come along and work hard and turn out a good proposition, the Metallizing Company of America seized upon the idea of the patent in suit, the metal spray guns that were on the market. The defendants seized upon the idea of the patent in suit and they put out a beautiful new gun which they called the Mogul. They advertised it up to the skies and they pointed out in their advertisements the very features which we stress in our patent and which are the essential features of the gun. Is there any doubt, Mr. Litzenberg, that this is the Mogul?

Mr. Litzenberg: I think not.

Mr. Huebner: And that it was manufactured by the [25] defendants subsequent to the granting of the patent and before the filing of suit?

Mr. Litzenberg: That is right.

Mr. Huebner: I offer it in evidence.

The Clerk: Plaintiffs' Exhibit No. 8.

Mr. Huebner: Will you also stipulate that this gun, Exhibit No. 8, the Mogul, was sold by the defendants to a party in Los Angeles?

Mr. Litzenberg: This particular one?

Mr. Huebner: You have sold guns identical to this in Los Angeles, haven't you?

Mr. Litzenberg: Yes.

Mr. Huebner: Mr. Litzenberg, here is a photo-static enlargement of your Mogul gun and I say this was taken from some of your advertising and literature. I want to point out to you that the first view has not been altered in any respect; that the lower view has not been altered except that we had our draftsman draw in some dotted lines in black ink. The dotted lines are intended to indicate some of the essential interior parts and that is the only alteration that has been made of the drawing. With that explanation, will you stipulate that this drawing illustrates the Mogul gun charged to infringe?

Mr. Litzenberg: It is a beautiful piece of work.

Mr. Huebner: And you so stipulate?

Mr. Litzenberg: Yes. [26]

Mr. Huebner: That will be offered in evidence.

The Clerk: Plaintiffs' Exhibit No. 9. [27]

Mr. Huebner: I have here a letter dated July 2, 1938, to the Metallizer Company of America, Inc., and Mr. L. E. Kunkler, president, signed by Mr. J. C. Martin, Jr., notifying those parties of the patent in suit and of their infringement. Will you stipulate that the defendants have had notice as of that date?

Mr. Litzenberg: We acknowledge receipt of it.

Mr. Huebner: Then I don't believe we will encumber the record with a full copy of the letter. I would like to ask Mr. Boyden if he will take the stand. [35]

CHARLES BOYDEN,

called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Charles Boyden.

Direct Examination

Q. By Mr. Huebner: State your full name, Mr. Boyden. A. Charles Boyden.

Q. Do you have a middle initial?

A. No initial.

Q. Where do you reside? A. Glendale.

Q. California? A. California.

Q. Do you care to give the reporter your street address? A. 1227 South Central, Glendale.

Q. Are you an officer of the defendant corporation, Metallizing Company of America, Inc.?

(Testimony of Charles Boyden.)

A. Vice-president.

Q. What office do you hold?

A. Vice-president.

Q. How long have you occupied that office?

A. Since '32.

Q. 1932? A. Yes.

Q. Are you an engineer by profession? [36]

A. Just an engineer.

Q. You have followed that profession for some time, have you? A. Since '24, 1924.

Q. And have been engaged in the metal spray business for some time? A. Since 1929.

Q. Was that the date of your affiliation with the Metallizing Company of America?

A. It was then the Metallizing Company of Los Angeles.

Q. The predecessor of the present corporation?

A. Yes. It was changed over to the Metallizing Company of America in 1932.

Q. And since 1932 you have been vice-president of the Metallizing Company of America?

A. Yes.

Q. And that company has a place of business in Los Angeles, California? A. It has.

Q. Where spray guns of the type known as Mogul and the type known as Metallizer have been manufactured and sold? A. It has.

Q. I would like to show you an issue of The Metallizer, which appears to be a magazine. In

(Testimony of Charles Boyden.)

fact, let us save time and show you three issues, which I will identify. [37] The first one is the mid-winter, January, 1936, number. The second one is the February and March, 1936, number. The third one is the April and May, 1936, number. And the fourth one is the June and July issue of 1938. Will you please examine those magazines and state whether you know what they are?

A. Well, they are the Metallizer magazine.

Q. Have you personally had anything to do with their production?

A. No. I write some stories for them occasionally.

Q. You write some stories for them occasionally?

A. Yes.

Q. Do you get paid for the stories?

A. No.

Q. You contribute the articles free, do you?

A. Yes.

Q. Do you personally know whether those magazines came out on or about the dates which they bear?

A. Well, I presume so. I wouldn't know for sure about that.

Q. When did you first see these issues that I have shown you?

A. Well, I would not remember that either. That is a long time ago.

Mr. Huebner: I would like to have these marked for identification, and then interrogate the witness further. [38]

(Testimony of Charles Boyden.)

The Clerk: As one exhibit?

Mr. Huebner: As one exhibit, A, B, C and D. Distinguish them, if you will, please.

The Clerk: They will be Plaintiffs' Exhibits 10-A, -B, -C and -D.

Mr. Litzenberg: We are willing to admit that these publications——

Mr. Huebner: That they are what?

Mr. Litzenberg: Publications issued by the Metallizing Company.

Mr. Huebner: The defendant?

The Witness: The Metallizing Publishing Company,—the Metallizing Engineer Publishing, isn't it? It is on the top there, anyway.

Mr. Huebner: We will proceed to ask the witness some questions.

Q. By Mr. Huebner: Does the defendant, Metallizing Company of America, have or has it had at any time any business association with the publisher of this magazine, the Metallizing Engineering Publishing Company?

A. Mr. Kunkler is the president of our company, and he is also, I think—well, you will find his name at the top. Frankly, I don't know or don't remember. Let me take a look at it, and I can tell you. Well, I would say offhand it was Mr. Kunkler's company.

Q. That is, the publisher is Mr. Kunkler's company? [39]

A. Yes. I mean he owns the company.

(Testimony of Charles Boyden.)

Q. Do you know whether the Metallizing Engineering Publishing Company, which you say was Mr. Kunkler's company, is a fictitious firm name or is that a corporation?

A. I think it is a fictitious name.

Q. Under which he did business in publishing this magazine? A. Yes.

Q. And at the time he did business under that fictitious name, that fictitious firm name, publishing this magazine, was he president of the defendant Metallizing Company of America, Inc?

A. Yes.

Q. Did you personally have anything to do with the publication of this magazine?

A. No. I just wrote stories for it occasionally.

Q. You knew, did you, that the company, Metallizing Company of America, was inserting advertisements from time to time in this magazine?

A. I did.

Q. Isn't it actually a fact, Mr. Boyden, that this magazine known as The Metallizer was really a house organ of the defendant The Metallizing Company of America, Inc.?

A. Well, it could be considered that.

Q. It was controlled by the defendant corporation, wasn't it? [40]

A. It was controlled by Mr. Kunkler.

Q. Wasn't it actually controlled by the defendant corporation?

A. No. It was a separate company. It was a

(Testimony of Charles Boyden.)

publishing company. In other words, I can explain it this way, that the bank account was separate from the Metallizing Company, if that means anything.

Q. But except for the separate bank account, it was simply one of the operations of the Metallizing Company of America, wasn't it?

A. You mean the promotion of the magazine?

Q. Yes.

A. It was put out to promote business.

Q. It was put out to promote business in spray guns manufactured by the Metallizing Company of America?

A. We naturally would favor the Metallizing Company of America's gun.

Mr. Litzenberg: You paid for the advertisements, did you not, your company?

A. Yes, our company paid for the advertisements.

Mr. Huebner: I think these are sufficiently established now to offer them in evidence. They were previously only marked for identification.

PLAINTIFF'S EXHIBIT No. 10-a

The Metallizer

The Official Organ of the International
Metallizing Association

Midwinter Number December, 1935-January, 1936

The Metallizing Company of America will soon have available in addition to their "Metallizer" gun

(Testimony of Charles Boyden.)

a new metal spray unit known as the "MOGUL." This piece of equipment has been designed and built with but one thought in mind: i.e., to offer to the public the finest piece of metal spraying equipment it is possible to produce today.

Possessing the same general characteristics as the well-known "Metallizer," certain features have been incorporated which make the "MOGUL" particularly adaptable to certain classes of severe service and there is little doubt that it will find a welcome in this respect.

Primarily the "gun" was intended for mounting in the tool post of a lathe to be used for machine element coating and for that reason no particular effort was made in the design to keep the weight at a minimum, but despite that, it is not too heavy to be used as a portable tool and will be available for that purpose as well as a lathe tool.

One feature worthy of note is that the wire feed mechanism and gas head, while attached to each other, are in reality separate units. This departure from the conventional reduces the replacement cost in case either assembly is damaged and furthermore permits of a better combination of metals being used for the construction of these parts.

The wire feed unit is self-contained and all the worms and gear-shafts are mounted on annular ball bearings and these assemblies run in a bath of fluid grease and are completely inclosed in a dust-proof case. The use of annular bearings insures permanent

(Testimony of Charles Boyden.)

alignment of the worms and gears and reduces to a minimum wear on these parts. The turbine has more power than is actually needed and runs at a slower speed than is found in equipment of this type and because of its proportions it will maintain a steady flow of power without continual adjustment. The various parts which enter the construction of this unit are made with a full appreciation of the service to which they will be subjected and it is needless to say that only the finest materials have been used.

The gas head is a bronze casting and the simultaneous control valve is of hard bronze. Splendid wearing qualities are assured through the use of this combination of materials and the valve will need very little attention. The gas and oxygen mixing is done in a metering tube which is so designed that there is little likelihood of flash back down the oxygen hose. A hardened steel wire guide tube is incorporated in the assembly so as to reduce wire wear in the parts of the front end.

The complete separation of the gas head and wire feed mechanism is an insurance against combustible gas mixtures working back into the inclosed gear case through gas mixing channels drilled in the gear case proper.

The thought behind the "MOGUL" has been to produce a metal spray unit which would stand up under severe service. A unit which would "stay put" and continue to perform without interruption;

(Testimony of Charles Boyden.)

in other words, a production tool. And that much has been accomplished.

The "MOGUL" gun does not replace the Metallizer gun but is a "high power" hand-built production tool.

"MOGUL" gun, Model "A" is for the production-spraying of steels, monel, and nickel.

"MOGUL" Gun, Model "B" is for the production-spraying of aluminum, bronzes, copper, and brass.

Page 16 The Metallizer—Midwinter, January, 1936

[Endorsed]: Plaintiff's Exhibit No. 10-a. Filed 4/30/40.

PLAINTIFF'S EXHIBIT No. 10-b

The Metallizer

The Official Organ of the International
Metallizing Association

February-March, 1936

AN INTERVIEW WITH CHAS. BOYDEN

By V. M. Moynahan

Photo shows MOGUL Unit mounted on Lathe, spraying Stainless Steel on pump rod. Actual time check showed 10.2 lbs. sprayed in one hour. Smooth coating obtained.

[Photo omitted]

Since the event of the Mogul Metallizing Gun, the public has shown such inquisitive interest that

(Testimony of Charles Boyden.)

the writer decided to go over and pay a visit to the inventor of the tool which is causing such active comment. Mr. Charles Boyden of the Metallizing Co. of America Inc. is the gentleman responsible for this tremendous advancement in the metal spraying field.

He is a gentleman rather given to over conservatism than to exaggeration in his claims for any of the metallizing tools. However, after a few minutes with him, we discovered that the new mogul is absolutely everything that we have been hearing, and more. Its main virtue is its ability to spray hours upon end without the slightest attention from the man who is doing the job. It is mounted lighted and the rest is accomplished as though by magic. It doesn't overheat or vary in its continuous operation. Mr. Boyden's exact words seem to tell the story completely. The interview follows:

"The Mogul owes its existence to the continuous demand for a metal spraying unit which would give greater speed in spraying metals of comparatively high melting point and at the same time would require practically no attention in production work.

"Mechanically, there is little that need be said about the gun. The wire feed mechanism is built much like an automobile transmission with the shafts mounted in annular ball bearings and the complete gear assembly inclosed in a dirt

(Testimony of Charles Boyden.)

proof case packed with grease. This practically eliminates the necessity of greasing or oiling the mechanism and assures adequate lubrication at all times. Only the finest materials are used in the construction of the units because there are no limitations in manufacturing costs, the main idea being to manufacture something that would stay put and keep going and stand up under severe service.

“The melting and atomizing end of the gun, which is really the heart of any metal spraying unit, is not built along the conventional lines that most people are familiar with. The design is such that better mixing of the gases is accomplished and greater volumes are handled. To get increased spraying speed was no great problem, but to get this speed and still maintain a coating of fine texture, which is necessary for satisfactory results, and do this economically, required considerable time to work out. Getting unusual results in a *laboratory* and in the hands of the average *user* are entirely different things.

“The experimental Mogul was built about a year ago and for six months passed through the experimental stage. At the end of that time it was re-designed, certain additional features were incorporated, and it was ready for production. Jigs and fixtures were made. Plug, ring and thread gauges purchased so close manufacturing tolerances could be maintained. About a

(Testimony of Charles Boyden.)

month ago the first Moguls were ready for distribution.

“The Mogul is a high capacity gun. More than that it is an economical gun. We measure economy by the actual amount of money it takes to spray a pound of metal. We have been able to spray a pound of stainless steel using very slightly over four cu. ft. of acetylene and have sprayed 18-8 at better than ten pounds per hour. In fact, under ideal conditions we have reached nearer twelve pounds per hour. But we claim much less than this, to be sure that anyone can equal any claims we make. As I said before, certain things can be accomplished in the laboratory which probably will not be approximated in actual production service.

“A short time ago we started to develop ways and means of utilizing this high speed in connection with actual work. It was our desire to work out a method of coating a shaft or like piece in one transverse pass of the gun across the surface to be coated, putting on as much as $\frac{1}{2}$ " in a single coat if necessary. We immediately ran into a snag, however, as we found such heavy deposits had a tendency to crack or check and especially with stainless steel. The coating was built up so rapidly that the heat could not be dissipated sufficiently fast and as the complete coating cooled, cracks appeared. This difficulty was overcome by means of an air blast,

(Testimony of Charles Boyden.)

blowing a stream of cold air on the coating as fast as the metal was applied so now the full capacity of the gun can be utilized to best advantage.

“I consider the Mogul the finest piece of metal spraying equipment ever built by anyone at any price. To see it in actual operation, one can appreciate the reason for such a bold statement. It has everything.”

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[Endorsed]: Plaintiff's Exhibit No. 10-b. Filed 4/30/40.

PLAINTIFF'S EXHIBIT No. 10-c

The Metallizer

The Official Organ of the International
Metallizing Association

April-May 1936

COMPARE

A MASTERPIECE—the pinnacle of achievement—by the Metallizing Company of America, Inc., for the Metal Spraying Industry, the MOGUL Metallizer Gun—the ultimate in design, quality, precision and performance—FOOLPROOF.

Skillfully engineered, after giving sound and practical consideration to all phases and problems of the Metal Spray Gun Users, of this, and foreign

(Testimony of Charles Boyden.)

countries. Includes the suggestions from thousands of Metal Spray Equipment Users, desiring speed plus fineness of deposit:—a Gun that will operate hour after hour without adjustment, regardless of wire, regulators, gas adjustment, or experience of operator. The MOGUL, which has been put to every known scientific and practical test, is the most outstanding Metal Spray Gun for economical performance and mechanical perfection being built today. We GUARANTEE satisfaction. A demonstration and trial will prove our statements.

To operate a MOGUL one doesn't need to be a super-mechanic. Refinements in design and construction have eliminated customary metal spray gun troubles. Delicate adjustments are a thing of the past. The MOGUL is a tool for production purposes.

It is practically impossible to backfire the unit.

The MOGUL, like the Metallizer, uses the simultaneous valve control in which the gases and air are turned on and off in proper sequence and relation to each other. This eliminates the many adjustments found necessary in other equipment when starting and stopping the unit.

Words or Pictures cannot describe the MOGUL Gun—a metal spraying tool that thousands have asked for—POWERFUL, STEADY, RUGGED, DEPENDABLE. Regardless of the type of metal spraying unit you are now using—WIRE FOR A

(Testimony of Charles Boyden.)

DEMONSTRATION—SEE THE MOGUL OPERATE IT. You will then realize that words cannot describe this masterpiece.

You Will Want a Mogul

GAS HEAD

This member is separate from the wire feed mechanism so there is no chance of gases getting into the gear case. The hard bronze taper valve is held tightly against its bronze seat by a spring thereby making unnecessary any delicate valve adjustment.

TURBINE ROTOR

The rotor in the Mogul is large and powerful in excess of all requirements. Uniform wire feed is assured without constant adjustment. It is made of an aluminum alloy and is carefully balanced to insure smooth operation.

WIRE NOZZLE

The wire nozzle is of one-piece construction and is made of copper to withstand high temperature oxidation and the wire hole has a hardened face to give a good wearing surface.

COUNTERSHAFT

The countershaft as well as all the other shafts enclosed in the dirt-proof case are mounted on annular bearings. Perfect shaft alignment is maintained and freedom from bearing troubles assured.

(Testimony of Charles Boyden.)

FEED SHAFT ASSEMBLY

This assembly is sturdily built and mounted on annular ball bearings. Every piece in the assembly with the exception of the bronze worm gear is made of steel, hardened and ground to size.

MANUFACTURING TOLERANCES

Plug, Ring and Thread Gauges are used throughout to insure close manufacturing tolerances. Interchangeability of parts is thus assured. No expense has been spared in maintaining the highest possible standard of quality.

METALLIZING COMPANY OF AMERICA INC.

General Offices

Eastern Office

1351 East 17th Street 11th Floor So. Ferry Bldg.,

Los Angeles, Calif.

New York, N. Y.

Midwestern Office

Houston Office

205 West Wacker Drive, 5746 Dorbrandt Street,
Chicago, Ill.

Houston, Texas

Canadian Office

Export Office

McIntyre Bldg.,

44 Whitehall Street,

Victoria Sq.,

New York, N. Y.

Montreal, Canada

Cable (Rutowa)

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[Endorsed]: Plaintiff's Exhibit No. 10-c. Filed
4/30/40.

(Testimony of Charles Boyden.)

PLAINTIFF'S EXHIBIT No. 10-d

The Metallizer

**The Official Organ of the International
Metallizing Association**

June-July Issue, 1938

**COMPLETE PROCEDURE
FOR
A METALLIZING JOB USING
THE MOGUL UNIT**

Some drawings are included to which reference will be made. Before attempting any job the METALLIZER DATA MANUAL and the MOGUL INSTRUCTION MANUAL should be read thoroughly. The operator should acquaint himself with the MOGUL unit and it is suggested that he particularly study pages No. 2 and No. 3 in the Instruction Manual so that he will be acquainted with the wire feed mechanism and gas head. Although the unit is ready for operation when shipped, one should check the grease and relubricate the valve with the special valve lubricant in your MOGUL Box.

Before attempting any job, set up the equipment, light the gun, and practice obtaining the correct adjustment, using the various metals until the operator is very efficient in making the adjustments. How to light the gun and operate it is explained in the Mogul Instruction Manual on pages No. 6 to No. 9,

(Testimony of Charles Boyden.)

inclusive. Special care should be taken to study this section before attempting to light the unit.

After studying the above, set up the work in the lathe. Of course, any machinist can do this. Accuracy is not important within .005" unless the job is to be finished in the same set up. Some jobs such as cylinders, bearing retainers, pump housings, etc. are set up, machined, sprayed, and finished in one set up.

After setting up, one should take a cut across the work to clean it up, being sure to go deep enough to have at least $1/32''$ on the radius to build up with sprayed metal. At times a cut of more than $1/32''$ is necessary to level off worn spots but for normal applications $1/32''$ thick to finished size is sufficient. (There are applications requiring no undercutting or clean-up cuts. This will be explained later.) After the clean-up cut the work should be undercut or dovetailed at each end (see Dia. B) to lock the sprayed metal in at the ends because it is impossible to get a good rough thread next to a shoulder. There is one exception. **DON'T UNDERCUT OR DOVE-TAIL ON A CRANK SHAFT FILLET.**

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The next and most important step in spraying metal is preparation of the surface. The work must be kept clean and free of oil and moisture which might cause oxidation. The lathe should be run in back gear so the surface speed will be minimum as this helps in obtaining a well-shredded thread. The

(Testimony of Charles Boyden.)

carriage feed should be adjusted to equal 24 to 30 threads to the inch. The threading tool should be ground with every clearance exactly the opposite from a regular threading tool. (see Dia. A). This type of tool will tear the metal at the top and sides of the thread instead of cutting a clean thread. The tool must go deep enough into the work to tear out shavings in short fragments, turning them off to the right of the tool instead of curling to the left as is the case when cutting a good thread. If the tool leaves loose, torn pieces hanging to the threads, they must be knocked off with a square-nosed tool and the point of the threading tool raised just a fraction towards the center of the work to prevent this. (see Dia. C). If the tool cuts a clean thread, correct by dropping the point just a fraction. Be sure the tool is ground as described and if any keyways or oil holes are to be preserved, fill them with keystock or chalk before spraying, otherwise the sprayed metal will follow the contour of the work and fill in the keyway or oil hole. With high carbon steel it will be impossible to remill or drill these out.

The above procedure is followed in all cases except with cast iron which is more difficult to thread. For this 18 to 20 threads per inch are used. The threading tool should be a little more pointed, and the thread cut a little deeper so the cast iron thread breaks behind the tool without tearing. On cast iron work it is necessary to be sure that all oil is removed from the pores. This should be done by heating the

(Testimony of Charles Boyden.)

object sufficiently hot to draw or drive the oil out of the pores of the metal after which it can be wiped off with a rag.

Before attempting a job, practice the threading operation on scrap pieces until confident you can prepare a shaft satisfactorily. In Metallizing the proper preparation of the surface is of the **UT-MOST IMPORTANCE, SO WITHOUT FAIL, PRACTICE THREADING.**

To keep the work cool it is advisable to set up the auxiliary air blast on the back side of the carriage, and this will enable you to build up a $\frac{1}{2}$ " coating, though most applications will not require this thickness. The work should be rotated as slowly as possible and the carriage set so the coating will be applied in one pass across the work. There is no set rule to determine this speed, it depends on the thickness desired and the speed at which the different metal wires melt. In time an operator will be able to judge these speeds quite accurately.

The kind of metal used will depend on the surface-hardness desired and the conditions under which the job will operate—that is, whether it will be subjected to corrosive action or abrasive pounding, whether the coating is for a press fit or subject to a sliding action such as a cylinder wall.

The choice of steel wires for metal spraying is well worth considerable study. The various elements of which steels are composed will influence their behavior in spraying and afterwards, although it is

(Testimony of Charles Boyden.)

recognized that the carbon content determines the finishing qualities and hardness. Wire having .25 carbon or less can be readily machined after spraying and should be used for building up lands on pistons and for other applications which will require machining. Steel wires of .25 carbon or less can be turned, milled or tapped without difficulty but tapping is not recommended as the tensile strength of sprayed coatings is very low. The higher carbon wires, from .25 to 1.20, are very hard to machine, even with carbide tools, and are not recommended unless the job can be finished by grinding. They have a very hard surface and are used for resistance to abrasion or for long surface wear on crank shaft journals, cylinder walls, piston skirts, etc. Stainless steel wires are sprayed for extreme corrosion or corrosion with abrasion. Two recommended steel wires for this purpose are: Stainless No. 1 of low carbon content and machinable. Stainless No. 2 of high carbon content and file-hard as sprayed. A recent development is TUFTON Wire, a high carbon, chromium steel which tends to harden after it has been in service. It can be machined immediately after spraying but after standing a few hours, it becomes so hard it can only be finished by grinding. It is corrosion and abrasion resistant and is supplied in $\frac{1}{8}$ " diameter which cuts down the spraying time. Due to its machining qualities, completion of the job is speeded up, making it a very economical coating.

(Testimony of Charles Boyden.)

After a job is prepared it should be sprayed as soon as possible. Letting a job stand very long allows the air to oxidize the torn surface which will make a separation between the coating and the base material.

Hold the gun at an angle to fill in the dovetail, then straighten the gun. The normal spraying distance for this type of work is five inches, this distance being measured from the tip of the air cap to the surface being sprayed.

Before the gun is directed at the work all adjustments should have been made so that the metal is free from chunks as the atomizing takes place. Be sure enough metal is deposited so the work will finish at the desired diameter. This is important as it is much cheaper to put on a little too much metal than it is to do the whole job over as is necessary when not enough metal is applied. Check the job before finishing so you will be sure there is enough, usually 1/16" over the finish size, but if the coating is very rough, consideration must be given to the low spots.

The next step is to finish the work according to the requirements of the job. The three accepted ways to finish Metallized machine elements are: Preferably wet grinding; next dry grinding; and machining where the first two are impractical. After dry grinding, honing is recommended, and after machining a splendid finish can be obtained by using a fine cut mill file and abrasive cloth. This method

(Testimony of Charles Boyden.)

will produce a high polish hard to distinguish from grinding. When machining bronze or other alloys, a burnishing effect can be obtained by allowing the heel of the tool to drag. Of course, high carbon steel, high carbon stainless steel, and TUFTON after setting any length of time, must be ground finished. Low carbon steel, low carbon stainless steel, and TUFTON right after spraying may be machined. All alloys can be machined. It will be noticed that sprayed coatings machine similarly to hard, fine-grained castings. The rough cuts may be taken as fast as the tool bit will allow but the finish cuts should be very light to get the smoothest surface possible. Special grinding wheels are recommended for Metallized coatings to get the best results with minimum expense of replacing the wheels. Equally good results may be obtained by using any manufacturer's wheels conforming to the following specifications.

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For general use, all types of surfaces, with dry grinder,

Carborundum Resinal, Silicon Carbide,
Grit 50, Grade 12, Bond C 12 R-88.

Another good grade wheel for dry grinding all metals:

Sterling RC 303-K3E.

For wet grinding in the hard metal range:

C-54 Grain, K-55 Grade, Sterling Wheel.

(Testimony of Charles Boyden.)

Nearly all machine element jobs are prepared and sprayed according to the above procedure but for press fits we recommend the following: Sand blast the surface with a sharp, angular sand or steel grit and apply only a small amount of metal. If the operator is careful about applying only the required thickness, a small cut will finish or no finishing will be necessary. Jobs that cannot be put in a lathe to prepare them may be cleaned and roughened by sand blasting, then sprayed by hand, taking the same precautions for keeping the surface clean.

Preparing crank shafts is different from other jobs in that the fillet is not dovetailed, the surface is threaded about half way into the fillet so that when finished the wheel can regrind it with its round edge.

In spraying pistons we much prefer to only build up the skirt but if it is absolutely necessary to build up the lands we recommend cutting $1/32''$ off the lands and the top of the side in order that the metal may be keyed in on the side. This is practical only when the lands are over $1/2''$ wide. In preparing cast iron pistons one must remember the special threading instructions for this metal and that oil must be removed from the pores of the cast iron.

Occasionally a coating will crack or check, which may be due to several reasons:

1. Improper preparation;
2. Allowing work to get too hot.
3. Incorrect gas pressures.

(Testimony of Charles Boyden.)

The first can be cured by correcting your method of threading. The second can be taken care of by using the air blast at the back of the work to keep it cooler. And approximately 90% of such failures due to the third reason can be eliminated by correct gas adjustment.

The only way to know when the flame is "right" is to inspect the flame itself. Due to slight variations in the manufacture of metal spraying and associated equipment, it is quite impossible to specify exact gas pressures with any assurance that the flame will be NEUTRAL, therefore the pressures recommended by the equipment manufacturers can only be accepted as approximate and should be considered as such.

To correctly adjust the gases, the gun should be put in operation using the pressures recommended by the manufacturer. Next the oxygen pressure should be reduced until blue streamers are clearly visible in the fringe of the flame, after which the pressure should be increased until the white part of the flame shortens up, and the blue fringe streamers practically disappear. A correct flame can only be neutral when just sufficient oxygen is supplied, either from the tank or the air, to cause complete combustion of the gases and such a flame will give a maximum spraying speed comparable with a satisfactory metal structure.

An excess of acetylene in the gas mixture will cause less oxidation but, on the other hand, will

(Testimony of Charles Boyden.)

produce a coating that is coarse, soft, and spongy, which in many respects is less desirable than one having an excess of oxide. It will also reduce the spraying speed to a considerable extent so there is nothing to be gained in this direction.

Since the advent of the high speed spraying units the method of applying heavy coatings has changed considerably. Where it was formerly the practice to build up coatings in layers of thin coats it is now the custom to apply a continuous coating; *i. e.*, spray the coating to its full thickness in one pass of the spraying tool across the surface. A few years back it was not unusual to experience "layer separation" which was the result of excessive oxidation, whereas, today the same cause results in cracking or checking. While the results are different, the cause remains the same.

Unfortunately there are many operators who do not appreciate the value of precise adjustments when operating a metal spraying tool. Due to the method of spraying, there must be a perfect synchronization of the various factors which enter into the spraying operation. The flame must be exactly right as too much or too little oxygen will produce an unsatisfactory coating. Too fast a wire feed will cause the coating to be chunky whereas too slow a wire feed will not utilize the available calorific energy of the burning gases. An incorrect adjustment of the air cap will cause the coating to be rough in texture. So it becomes quite obvious that

(Testimony of Charles Boyden.)

a metal spraying unit can only work at maximum efficiency when all the adjustments are correctly made.

**DO NOT ATTEMPT A JOB UNLESS YOU
KNOW EXACTLY HOW TO PROCEED!**

Get in touch with the factory by air mail, telegraph or telephone for advice. This service is free. They can give you the advantages of costly experience and save you a great deal of money by preventing failures due to your operator's lack of experience. Give the process a fair chance. Don't attempt to use the equipment as a cure-all. There are places where it won't work, just as there are repairs which cannot be made by welding. Do not attempt to fill in cracks or holes where tensile strength is required as in such cases it is necessary to weld.

WIRE RECOMMENDATIONS

From long experience in supplying Metallizing wires, we have found the following wires to be the proper metals for the service recommended:

$\frac{1}{8}$ " Tufton Wire—Specially made for Metallizing. Should be used for bearing surfaces, journals, pumps, etc. where medium to good lubrication is available. Must be ground finished.

1.20 Carbon Steel—For abrasion where no lubrication is present. Must be ground finished.

(Testimony of Charles Boyden.)

.25 Carbon Steel—Special steel wire developed for Metalspraying, readily machinable and less prone to crack.

Stainless Steel Metallizing #2—High Chrome—Has greater percentage of chrome than Tufton and recommended where corrosion is more severe. Must be ground.

1/8" M-25 Bronze, non-fuming—extremely tough and wear resisting.

Special Lead—A patented alloy lead far more resistant to corrosion than straight lead.

Page 4 June-July, 1938—The Metallizer

[Endorsed]: Plaintiff's Exhibit No. 10-d. Filed 4/30/40.

Q. By Mr. Huebner: Now, on page 16 of Exhibit 10-a there is a picture of a spray gun and some descriptive text. Is that a picture of the Mogul? [41] A. It is.

Q. Does this text apply to the defendants' Mogul gun? A. It does.

Q. Do you know who wrote this text?

A. I may have written it myself. I don't remember.

Q. Will you look at it and see if you can refresh your recollection?

Mr. Litzenberg: I think it is immaterial as to who wrote it. A. I think I wrote that.

(Testimony of Charles Boyden.)

A. I would have said such a thing. Whether I said such a thing as that I don't know, but, in sum and substance, I would have, anyway.

Q. Did you actually give an interview with this V. M. Moynahan, or did you write that article?

A. I don't know. Frankly, I don't remember.

Q. Do you know V. M. Moynahan?

A. I do.

Q. Is that the same V. M. Moynahan who is listed here as editor of the *Metallizer* magazine?

A. It is.

Q. Did you know V. M. Moynahan at the time that this article was written? A. I did.

Q. Do you deny the truth of any of the statements made in this article? A. I do not.

Q. You don't deny the truth of any statement?

A. No. [44]/

Q. So that, whether you wrote it or didn't write it, or approved it or didn't approve it, it was true and correct? A. It was.

Mr. Huebner: I would like to hand this up to the court.

Q. By Mr. Huebner: By the way, is V. M. Moynahan the true name of the person who purports to have written that article?

Mr. Litzenberg: We object to that as immaterial and having no bearing on the issues.

The Court: Well, it will identify the person. You may answer. Is that the true name of the person?

(Testimony of Charles Boyden.)

A. Well, it is the maiden name of the lady.

Q. It is actually Mrs. Kunkler, the wife of the president of the defendant corporation, isn't it?

A. It is.

Q. Here in Exhibit 10-c, on pages 8 and 9, is a two-page advertisement of the Metallizing Company of America, Inc. Was that an authorized ad?

A. It was.

Q. Are the statements that appear in this ad true and correct? A. I would say so.

Q. If there is any doubt in your mind, please look at it, because I want a positive statement.

A. Well, I think they would be, because I don't think [45] we would have said something otherwise.

Q. Having reviewed the ad, are you prepared to state whether they are true and correct?

A. They are.

Mr. Huebner: I desire to call your Honor's attention to the following statement in this advertisement:

"To operate a Mogul one doesn't need to be a super-mechanic. Refinements in design and construction have eliminated the customary metal spray gun troubles. Delicate adjustments are a thing of the past. The Mogul is a tool for production purposes. It is practically impossible to backfire the unit."

Then under the title "Gas Head," it says:

"This member is separate from the wire feed mechanism so there is no chance of gases get-

(Testimony of Charles Boyden.)

ting into the gear case. The hard bronze taper valve is held tightly against its bronze seat by a spring thereby making unnecessary any delicate valve adjustment."

Now, on the back of The Metallizer, Exhibit 10-d, there is another ad.

Q. By Mr. Huebner: Was that authorized by the Metallizing Company of America?

A. I presume so.

Q. Is there any doubt about it?

A. Well, I presume Mr. Kunkler authorized the ad.

Q. Weren't you vice-president when the ad appeared? [46]

A. Mr. Kunkler takes care of all the selling and the advertising and all that stuff.

Q. Just look at the ad and see whether the statements which appear in the ad are true and false, and testify, please, whether they are true or false.

A. The only thing there is, it is just a matter of opinion as to the first statement there about the number of guns sold.

Q. Will you read that statement and then explain your answer?

A. "The gun that is keeping lathes busy and adding profits to over 1500 machine shops."

Q. You say there is a doubt in your mind whether that is a true statement?

(Testimony of Charles Boyden.)

A. Well, that came up once before, whether that refers to that gun or the guns before it, the Metallizer, the Mogul gun, or the Metallizer and the Mogul gun, combined sales.

Q. Well, that sheet there doesn't say anything about the Metallizer, does it? A. Not a thing.

Q. And that ad illustrates the Mogul?

A. Yes.

Q. And it identifies the Mogul by name?

A. It identifies the Mogul, yes.

Q. And it says at the top that this is the gun that is keeping 1500 plants busy, doesn't it? [47]

A. Yes.

Q. Do you still say that is false?

Q. I do, if that is specifically the Mogul gun. I didn't write the ad.

Q. What is false about it? In what respect is it false?

A. If it refers only to the Mogul in that 1500, then there was not 1500 guns sold.

Q. Your point is merely that there were not 1500 guns sold at the date this ad appeared; is that it?

A. That is what I am getting at, yes.

Q. There had been quite a large number sold, hadn't there?

A. There haven't been 1500 sold yet.

Q. There had been quite a substantial number sold at that date, hadn't there?

A. What is the date?

(Testimony of Charles Boyden.)

Q. The date is June and July of 1938.

A. Quite a few.

Mr. Huebner: I will hand this up to your Honor.

Q. By Mr. Huebner: Having shown your counsel first this little booklet entitled, "The Metalizing Instruction Manual," I would like you to examine it and state whether you know what it is.

A. I do.

Q. What is it? [48]

A. Instruction manual for the small gun, the Metallizer.

Q. The one I have referred to in my comments as the Metallizer gun?

A. The Metallizer, yes.

Q. And this manual was put out by the Metalizing Company of America in connection with the Metallizer gun? A. It was.

Mr. Huebner: I offer this in evidence.

Mr. Litzenberg: It might be well to put the date in.

Mr. Huebner: I don't know anything about the date of it. You can bring that out on cross examination, if you want to. I don't know anything about the date of it.

The Clerk: Plaintiff's Exhibit No. 11.

Q. By Mr. Huebner: Now, are the statements contained in this Plaintiffs' Exhibit 11 all true and correct? A. They are.

Mr. Huebner: I have at this time no particular pages to point out to your Honor. It is a discussion

(Testimony of Charles Boyden.)

of the use of the small Metallizer gun. Probably in argument or in my brief I will want to refer to parts of it.

The Court: Very well.

Q. By Mr. Huebner: Here is a little booklet entitled, "The Mogul Instruction Manual, Model A and B." What is that, if you know?

A. That is the instruction manual for the Mogul.

Q. And it was authorized by the defendant corporation? [49]

A. It was.

Q. And the statements in there are all true and correct?

A. Yes.

Mr. Huebner: I offer this in evidence.

The Clerk: Plaintiffs' Exhibit No. 12.

Q. By Mr. Huebner: And here is a Standard Mogul Spare Parts List. Have you seen that before?

A. I have.

Q. What is it?

A. It is just a parts list, the replacement cost, etc., of various parts.

Q. Of the Mogul gun?

A. The Mogul.

Q. And the contents of this are all true and correct?

A. They are. I wrote it.

Mr. Huebner: I offer this in evidence.

The Clerk: Plaintiffs' Exhibit No. 13.

Mr. Huebner: I just want to read one or two pages from this Mogul Instruction Manual, Plaintiffs' Exhibit No. 12: "This assembly——" Speaking of the wire feed mechanism, which is what we in the patent have designated as the power unit; in

(Testimony of Charles Boyden.)

other words, the power unit of the patent and the wire feed mechanism of the Mogul gun are the same thing——

“This assembly consists of those parts contained in the aluminum case. Being a dirt-proof case completely enclosing the gearing, it is quite impossible to show the [50] assembly of the various members, but due to the simple arrangement of the parts a description will suffice.”

And then it goes on on page 2 to describe what they have designated as the wire feed mechanism, and what we call a power unit. And then under the heading “Gas Head Assembly”, it says:

“This assembly being more clearly shown consists of the gas head proper which attaches to the aluminum case with two screws.”

They have used the expression, “Gas head,” and we have in the patent called it power unit, and this goes on to describe on page 2 and page 3 the so-called gas head assembly, and I should like to direct your Honor’s particular attention to those passages on those pages. [51]

Q. By Mr. Huebner: Being an engineer, Mr. Boyden, I presume you are able to read drawings?

A. Yes.

Q. And you are thoroughly familiar with the construction of the Mogul gun, are you not?

A. Yes.

Q. You engineered it, I presume?

(Testimony of Charles Boyden.)

A. I designed it.

Q. Now having in mind the language of the instruction manual where the parts are designated, the gas head assembly and wire feed mechanism, would you indicate which of the constructions illustrated in this enlargement of the Mogul gun is the gas head assembly and which is the wire feeding assembly? I presume this is the gas head assembly?

A. That is the gas head assembly.

Q. And this is the wire feed assembly?

A. That is right.

Q. And this might properly be designated the combustion unit? A. Yes.

Q. And this might be properly designated, as a whole, the power unit? A. Power unit.

Q. Between the walls or the housing on the power unit, assuming that the housing for the turbine is one housing and that the housing for the gear is another part, and that there [52] are these walls as illustrated defining an opening or channel between those two housings, there is an opening or channel between them as illustrated, isn't there?

A. There is.

Q. And that communicates with the atmosphere as illustrated? A. Yes.

Q. And in that channel the wire feeding wheels operate as shown, do they not? A. Yes.

Q. And those wire feeding wheels are aligned, are they not, with a little wire guide, and said wire

(Testimony of Charles Boyden.)

guide is for directing and propelling the wire through the gun and into the nozzle for further operation? A. That is right.

Q. And in the nozzle of the gun the melting occurs and the melted or molten metal is atomized and blasted by means of air pressure, is it not?

A. That is correct.

Q. The upper wire wheel in the Mogul gun is mounted on an axis or pivoted arm, isn't it, as shown? A. Yes.

Q. And that may be thrown out of the way or put back into position in the manner I have just indicated with the pointer; is that correct?

A. That is correct. [53]

Mr. Litzenberg: If the court please, I fail to see where it is necessary to take the time of the court to go into things that are so mechanically obvious to anybody who understands anything about drawings at all. It seems to me we are consuming a great deal of time just preliminarily, in showing something that appears on the face of the drawing to be very, very obvious, and failing to get to the vital part of this case.

The Court: You might make a statement and counsel might agree that it is so, if it is not subject to dispute. Perhaps your description will be agreed to by him.

Mr. Huebner: I have almost finished with that phase of it, your Honor.

The Court: Very well.

(Testimony of Charles Boyden.)

Mr. Huebner: I gave counsel an opportunity a while ago to make any statement he wished in regard to infringement, and he said he contested it, so now I am attempting to establish the identity of the parts.

The Court: I thought possibly you might be able to agree as to the means of operation and the location of the parts with relation to each other, but he says he does not agree as to infringement.

Mr. Litzenberg: I didn't understand counsel, when he asked me then if we admitted infringement and I said no, to intimate that I should at that time make any kind of statement as to the grounds upon which we deny infringement. [54]

Mr. Huebner: I will proceed as rapidly as possible, unless your Honor directs me otherwise.

The Court: Very well.

Q. By Mr. Huebner: The lower wire wheel in the Mogul gun is mounted down deep in the channel, isn't it?

A. It is mounted just below the top.

Q. It is a continuation of the shaft I am indicating there, isn't it? A. Yes.

Q. It goes straight through inside there?

A. Correct.

Q. And the lower one is driven by means of power derived from the turbine and communicated through gears onto the shaft of the wheel?

A. That is correct.

Q. And the upper wheel is an idler?

(Testimony of Charles Boyden.)

A. That is correct.

Q. And the tension of the upper wheel may be regulated by means of this spring and screw arrangement?

A. That is correct.

Q. The combustion unit or gas head of the Mogul gun is completely removable from the power unit or wire feeding assembly by removal of three screws, isn't it?

A. Two screws.

Q. Well, it is three screws in the patent and two screws on the Mogul gun. [55]

A. Well, we won't argue on that.

Q. And the part between what you call the gas head or combustion unit and the power unit or the wire feed assembly is that dark line in the lower section of the Mogul?

A. That is right.

Q. And this dark line represents a shoulder or abutment on the forward end of the power unit member or combined housing, doesn't it?

A. That is right.

Q. And the joint occurs between that forward shoulder or abutment and flush face at the rear part of the combustion unit, doesn't it?

A. Correct.

Q. Incidentally, Mr. Boyden, have you read the patent in suit?

A. Oh, yes.

Q. Are you familiar with its contents?

A. Practically backwards.

Q. And you also are familiar, I suppose, with the plaintiffs' commercial gun embodied in Exhibit 5?

A. Yes.

(Testimony of Charles Boyden.)

Q. In answering the last series of questions in regard to the structure of the Mogul gun, you were aware, were you not, that I was appropriating language from both the patent in suit and your own advertising literature, and using it synonymously, in several cases? [56] A. I did.

Q. And when I spoke of the gas head assembly and the combustion unit I meant one and the same thing? A. The same thing, yes.

Q. And when I spoke of the power unit and the wire feed assembly I meant one and the same thing? A. Oh, yes.

Q. Both the gun of the patent in suit and the Mogul gun will operate to spray molten metal?

A. They will.

Q. Using the same kind of ammunition or wire?

A. Yes.

Q. And they both perform that function by the introduction of wires through a rear wire guide?

A. They do.

Q. And the ejection of the wire through a forward wire guide?

A. They both work the same.

Q. Maybe you are willing to admit they are identical in construction and in operation and in results?

A. I would say the results are the same and they operate very closely the same, and in structure there is some difference.

(Testimony of Charles Boyden.)

Q. What do you have in mind in regard to the difference in structure?

A. Well, the general set-up is altogether different. [57] They speak of the open channel and also the visible wire feed in that gun, in the metal spray gun, which is very visible. You can see it in any position.

Q. Well, I don't want to restrain you, Mr. Boyden, but—

A. What I am getting at is the difference. As far as the operation goes, it is exactly the same. This gun looks the same as the Mogul, the Metallizer works the same, the Metallizer Engineering Gun works the same. Fundamentally they all work the same. It was a basic design, originated along about 1912 or 1913.

Q. Well, let us confine these particular questions to a comparison of the patented gun and the Mogul. I don't want to confuse it by a reference in generalities to all previous guns. I stated in my opening statement that the process itself was not new.

A. That is true.

Q. We make no claim to the elements of the process. Let us refer more particularly or specifically to the gun of the patent and the Mogul gun. You concede that the patented gun and the Mogul gun operate in exactly the same way?

A. They do.

Q. To produce exactly the same results?

A. They do.

(Testimony of Charles Boyden.)

Q. And that the structure is just about the same, except that you observed some little differences?

[58]

A. That is right.

Q. I am asking you to point out to the court, if you will, and, if you desire, you may step down and refer to the drawings, what those differences are that you observed.

A. In this gun here the wire feeding in through the rear passes through the feed rolls and is visible in the feed roll. It seems quite important that it does so. I don't know just why, but nevertheless that is one of the claims. It can be seen from here or anywhere around the gun. In our gun you can't see it.

Q. Will you close that latch? And will you put some wire in it to demonstrate your point?

A. Where the wire passes between the feed rolls it can be seen. We call them wire rolls and you call them feed rolls. And here you can see them passing through. The wire can be seen passing through on the front and also the rear, the visible feed all through the feed rolls.

Q. How does that differ from the Mogul? Go on and explain that more in detail, please.

Mr. Litzenberg: That is a very important part, and I would like to have the witness continue.

The Court: If he has anything more to say about it, let him say so.

(Testimony of Charles Boyden.)

Mr. Blount: Counsel will have an opportunity to examine the witness on cross examination.

The Court: I know, but he can continue his explanation. [59]

Mr. Litzenberg: The court is referring to any further statement that you wish to make.

The Court: Did you fully answer the question, or is there something that you want to add about the wire that passes through?

A. That is one feature that is different in this gun.

Q. By Mr. Huebner: Is there any other feature that is different?

A. Well, just a difference in the arrangement of the parts, that is all. Outside of that, I don't see any great difference.

Q. When you speak of the arrangement——

A. For instance, our gas head was all up here; our combustion chamber was all up here. It was simply a matter of design, was all. Fundamentally they are all about the same.

Q. Now, you wanted to go on with the Mogul gun?

A. The wire, you cannot see it through between the feed rolls, in this position around here. I believe that is one of the patent claims. I don't know.

Mr. Litzenberg: Just go ahead and explain your machine. A. That is all there is to it.

Mr. Litzenberg: With regard to the features to which you have referred in the other exhibit.

(Testimony of Charles Boyden.)

The Court: He states that a view of the wire may be had in one, and he says it can't be seen in the other. [60]

A. It can't. That is one thing. As far as the rest of it goes, it is merely a matter of—well, this is the combustion unit here, and this is all combustion unit here, but that is all a matter of design. It don't amount to anything.

Q. By Mr. Huebner: It is not really a distinction—

A. No. This one swings back.

Q. That is one of the details of this part of the combustion unit, and this part is not a real distinction, is it?

A. No. It is just a matter of that we liked it this way, and the other gentlemen liked it better that way.

Q. You have pointed out that in the patented gun it is possible to view the wire from the rear as it is passing through the gun? A. Yes.

Q. And that in the Mogul gun the wire is not so visible from the rear as it is passing through?

A. No; it isn't visible at all.

Q. All right. Are there any other—I think you have answered that. I think you said that aside from that there is no other difference worth noting?

A. Nothing of importance.

Q. Now, if you take the Mogul gun and you hold it as I am holding it now and look down, you can see the wire, can't you?

(Testimony of Charles Boyden.)

A. I don't see it feed through the feed rolls. That is [61] the way it is specified.

Q. If you look in right there, can't you see the wire going into the feed rolls?

A. I don't know.

Mr. Huebner: I will show this to the court and ask the court to look at it.

A. I take that to mean when the wire passes through the feed roll.

Q. Looking from the left side of the gun, isn't it wholly possible to see the feed wire both at the rear part of the feed roll and the forward part of the feed roll as it is passing through the gun?

A. It can be seen at the rear, and also the front.

Q. Looking from the side of the gun, from the top of the gun?

A. Yes, or from the top of the gun, you see it in front.

Q. And from the side of the gun you can see both the front and rear of the feed rolls, can't you?

A. Here, yes.

Q. That is, from the side of the gun?

A. Yes, you can see the wire.

Q. Both places? A. Both places.

Q. Now, if any backfire occurs through the nozzle in the Mogul gun, it will be dissipated through the openings of the channel, won't it? [62]

A. In here?

Q. Yes, if any backfire comes back into here, it is going to exhaust into the air, isn't it?

(Testimony of Charles Boyden.)

A. Well, the backfire takes place down in the gas channels.

Q. So that if that happens, then you have to remove the combustion unit and put a new one on?

A. No.

Q. Or drill it out or clean it out? A. Yes.

Q. If any explosion, if any backfire does reach clear back into the open channel between these housings, it is exhausted, isn't it?

A. In here?

Q. Yes.

A. Well, it might flash a little bit.

Q. It wouldn't do any harm, would it?

A. It wouldn't do any harm, no.

Mr. Huebner: Your Honor, I probably am through with the witness, but I should like to look over my notes. Do you intend to adjourn during the noon hour?

The Court: Yes, I do. We will adjourn until 2 o'clock, gentlemen.

(Whereupon an adjournment was taken until 2 o'clock p. m. of this same day.) [63]

Afternoon Session

2:00 o'clock

CHARLES BOYDEN

recalled.

Mr. Huebner: You may cross examine, Mr. Litzenberg.

(Testimony of Charles Boyden.)

Cross Examination

Q. By Mr. Litzenberg: Mr. Boyden, I hand you Plaintiffs' Exhibit No. 5, which you described this morning, and will ask you to describe a little bit more in detail the openness which makes it possible to view the wire during the operation of the machine, that is, from all sides.

A. Let me take your pencil a minute. It is open all the way back here, a complete view of everything. It is open all the way around here, with a complete view in the front here, and the body of the gun here or, rather, the open channel so-called, is open on the top and the bottom and the rear and the side, completely open.

Q. Can the wire as it enters the wheels and as it emerges from the wheels be seen during the operation of the machine? A. It can.

Q. I hand you the Mogul, Plaintiffs' Exhibit No. 8, and will ask you if it is possible to see the wire under the wheels and emerging from the wheels during the operation of this machine.

The Court: Use a wire in it. [64]

A. Well, in a normal operating position, no.

Q. By Mr. Litzenberg. You cannot see the wire as it enters between the feed wheels or as it emerges from the wheels as you would hold the machine in operation? A. No.

Q. So that, if anything happened in connection with the wire being broken or crumpled, you would

(Testimony of Charles Boyden.)

not be able to see it during the operation of the machine? A. No.

Q. I will refer to the large drawing, Plaintiffs' Exhibit No. 9, and call your attention to the lower figure and will ask you what makes it possible to see the daylight to which counsel referred on this drawing.

A. Well, they didn't have a grip on there or a tool post mounting on the bottom here. This member was not on or the other member that goes on there.

Q. So that this machine does not have the handle on it? A. Yes; it does not.

Q. What other condition do you see in this machine which makes the visibility possible there which has been referred to?

A. Do you mean on this machine here?

Q. No; on this drawing.

A. Well, the feed roll is thrown back out of the way.

Q. The feed roll is thrown back in this figure, which makes it possible to see the feed gear and the feed wheel? [65] A. Yes.

Q. That is not possible up here? A. No.

Q. And, in order to see the feed wheels in the Mogul machine, it is necessary to lift the upper feed wheel and the pivoted lever back, is that correct?

A. Well, it is possible to see them but not normally in the normal operation of the spring.

(Testimony of Charles Boyden.)

Q. That is, you can, by peeking down in there, just see the edge of the lower wheel and you can see, of course, the upper wheel? A. Yes.

Q. But you could not see it or inspect it in that way under operation? A. No.

Q. Do you consider the visibility feature as of any importance in designing the Mogul machine?

A. No; otherwise, I would have opened it up so you could see it.

Q. Were you acquainted with any machine that was more similar to the Mogul machine than is Plaintiffs' Exhibit No. 5? In other words, if I make myself clear, prior to your designing of the Mogul machine, were you familiar with any other machine of this general type which was more similar to this machine, the Mogul, than it was similar to the plaintiffs' machine? [66]

Mr. Huebner: I object to that, your Honor, as calling for a conclusion. If he wishes the witness to identify some machines and testify as to their construction, he may do that.

The Court: He may answer generally first and then point to any details.

Q. By Mr. Litzenberg: Just answer it in a general way.

The Court: Answer it yes or no.

A. Yes.

Q. By Mr. Litzenberg: Can you state what that machine was?

A. The Societe Nouvelle de Metallization.

(Testimony of Charles Boyden.)

Mr. Huebner: May I suggest, your Honor, I personally have no objection to the defense material coming in at this stage of the proceedings but it might be somewhat confusing. I just call that to the attention of the court and raise the objection technically that it is not proper cross examination.

The Court: I shall have to sustain it on that ground. It is defensive.

Q. By Mr. Litzenberg: Referring now to Plaintiffs' Exhibit No. 7, which is a photostatic enlargement of the drawings, what machine is that?

A. The metallizer.

Q. That was one of the first machines you manufactured? A. It was. [67]

Q. And that machine has feed rolls?

A. It does.

Q. And it has the power plant? A. Yes.

Q. And it has the spring-held upper feed roll?

A. It does.

Q. For yieldingly holding the upper feed roll in connection with the wire? A. It does.

Q. It has the gas plant or the vaporizing nozzle?

Mr. Blount: Your Honor, it seems to me this is quite leading, all of this.

The Court: He is cross examining your witness under the rule. We allow leading questions in that situation.

Q. By Mr. Litzenberg: In other words, your first machine had all of the fundamental elements used in most of these spray guns?

(Testimony of Charles Boyden.)

A. It did.

Q. And your Mogul machine was simply a further refinement of the machine shown in this drawing?

Mr. Huebner: That is objected to as calling for a conclusion of the witness, your Honor.

The Court: Yes; that does call for a conclusion of the witness unless he proceeds to particularize. The witness may generally give an answer, which in itself is a conclusion, if he immediately will show by particulars a [68] justification for it.

Mr. Litzenberg: I was going to have him state in what particulars.

The Court: Let him state.

Q. By Mr. Litzenberg: Will you please state, then, in what particulars you made the Mogul machine an improvement over this first machine or, in other words, the objections which you sought to overcome, if any, in this machine?

A. Well, the gears were housed in and ran in a bath of grease continually.

Q. You are referring to this drawing?

A. No. I mean the Mogul was different than that gun. And the shafts were all mounted in ball bearings. The gas head was separate to get away from aluminum. I wanted a bronze seat on my valve. The turbine was made larger to give more power. Aside from that, I don't know of any other particulars.

(Testimony of Charles Boyden.)

Q. Was there any advantage in the change which you made on the top?

A. I wouldn't say so. Do you mean as to whether you have a lid or whether you don't?

Q. Yes.

A. Nothing particularly. There is no advantage in seeing the feed rolls that I know of.

Q. When you spoke this morning in regard to the operation of the two machines, that is, the Mogul machine and [69] the plaintiffs' machine, of the operation being the same, I wish you would elaborate a little bit more upon that and point out if there are any differences in operation.

A. Well, in the fundamental operation of any metal spray gun that is using air for power and a wire gun using wire, I would say that they are all fundamentally the same and have been ever since along about 1910, 1911 or 1912 or in there, all of them.

Q. That is, as to the general fundamental function?

A. The function of the gun and the result produced.

Q. Would you say that there are any improvements in operation between your machine, the Mogul machine, and plaintiffs' machine, any details in the operation?

A. Well, that would only be drawing a conclusion on my part, that is all, as I see it.

Mr. Litzenberg: I guess that is all I will ask Mr. Boyden at this time.

(Testimony of Charles Boyden.)

Redirect Examination

Q. By Mr. Huebner: Mr. Boyden, the handle of the Mogul gun is hollow, isn't it?

A. It is supposed to be. It is where the core print comes out.

Q. What was that expression you used?

A. Core print.

Q. What is a core print?

A. Well, the handle is cast hollow and there is a core [70] goes up in there and it has to be supported at each end and that is where the core comes out.

Q. So the handle is hollow its full length?

A. The handle is hollow its full length but you can't see down through it its full length. Take a look.

Q. It is true, however, that the handle is hollow and that there is thus provided a communication between the atmosphere at the lower end of the handle and the interior of the open channel?

A. Yes; for no reason whatever, though.

Mr. Huebner: I move to strike the latter part of the witness' answer.

A. O.K.

The Court: Yes.

Q. By Mr. Huebner: You referred to a tool mounting, I believe.

A. That is the tool post mounting.

Q. And this little post here may be substituted

(Testimony of Charles Boyden.)

for the handle where you desire to use the gun on a lathe? A. That is right.

Q. I call your attention to two holes which are drilled in that device. Those holes provide a communication, do they not, between the open channel and the atmosphere below the gun?

A. Oh, yes.

Mr. Huebner: I think that this tool post had better [71] be offered in evidence as a part of the accused gun.

The Court: It may be received.

Mr. Litzenberg: I would like to have him explain that communication.

Mr. Huebner: You will have a chance, Mr. Litzenberg.

The Clerk: Plaintiffs' Exhibit No. 8-A.

Q. By Mr. Huebner: You have pointed out a considerable change in the structure. You formerly manufactured the metallizer gun? A. Yes.

Q. With some deficiencies which you conceded. And now you are manufacturing the Mogul?

A. Yes.

Q. Why did you change the design from the metallizer form to the Mogul form?

A. Well, so that—let me take the gun. The worms and gears in the metallizer in through here, which you can't see here, are all exposed. So they were housed in and they all run in a bath of grease so that they wore better. They are all mounted in ball bearings, that is, the shafts were so they

(Testimony of Charles Boyden.)

would be provided with gears, and the turbine was a little bit underpowered, if anything, on that gun. So I put a larger turbine in. And the taper valve was in the case and was seated in aluminum and there was considerable wear on the aluminum. So, to get away from that, I put the taper valve in a bronze casting here, [72] with the head separate. Otherwise, if I would have made the whole case of bronze, it would have been too heavy. In other words, I did the things I needed to do to get the results I wanted.

Q. For instance, why did you leave this open channel for the operation of the wire feed wheels between the housing for the turbine and the gear housing?

A. It was a perfectly logical way to do it and the way anybody would have done it. If I may have a metallizer, I will show you. The arrangements of the parts in this gun are exactly the same as they are in this gun. It is this way. In this gun there is a worm shaft comes across from the turbine over here into the bearing the same as it does here. [73] There is a countershaft that comes up underneath here in both guns exactly the same. The feed shaft goes across on this gun the same as it does on this gun. All it does is just house in those members. That is all there is to it and it is the logical thing to do. And it had been done anyway before.

Mr. Huebner: I move to strike that out, if your Honor please.

(Testimony of Charles Boyden.)

The Court: Yes; it may be stricken.

A. Okay. That will be introduced later.

Q. By Mr. Huebner: However, Mr. Boyden, in the Metallizer Gun there is no space between the gear train and the wire feeding wheels, whereas there is a substantial space in the Mogul, as is arranged for by the rather wide separation of the turbine housing and the gear housing. Now, wasn't there some reason for that?

A. Surely, there is a reason for that. I have got an annular bearing down in here. You can see it down in here. It is about three-eighths of an inch wide. So that would certainly mean moving it over that much.

Q. Why, then, in the Mogul did you move the housing for the turbine off the other way?

A. This way?

Q. Yes.

A. How does it come in here now?

Q. In the old gun it is flush and in the new gun it is [74] moved off to one side.

A. Suppose we take this wall and move it over here. Then we would have gotten the same result as here.

Q. I don't think that is quite clear.

A. Supposing we take this wall here and just jog it over here and bring it down in through here. Then we have the same result we have here. You will notice one thing, that this housing covers or screws around the outside and this screws around

(Testimony of Charles Boyden.)

on the inside to this member here. So, therefore, I have to move this wall over here so I can get the cover on, if that explains it to you or if you understand what I mean. It is just simply a different design. You do what you have to do to get certain results, is all.

Q. Do you get better and more satisfactory results by the Mogul than you do with the metallizer?

A. It is faster.

Q. What do you mean by that?

A. It sprays more metal in a given time.

Q. Is that the only advantage?

A. That is a sufficient advantage.

Q. What about these various advantages that were pointed out in the advertising literature. Don't those mean anything?

A. Why, surely. You get a longer lived gun running in a bath of oil. There is less wear on the worms and gears and bearings. [75]

Q. You give them the advantage of an oil bath in the Mogul, whereas, they had almost a dry lubrication in the metallizer, isn't that correct?

A. Well, except for a little grease.

Q. That is, you daubed a little grease on?

A. Yes.

Q. In the Mogul you have the advantage of segregating the wire wheels so that the fines do not foul the gears? That is right, isn't it?

A. That is true.

(Testimony of Charles Boyden.)

Q. Whereas, the fines did foul the gears in the metallizer, did they not?

A. Somewhat; not as much as would be thought, though.

Q. Now you have the advantage in the Mogul, do you not, of the open channel, which you do not have in the metallizer?

A. Well, what is the advantage?

Q. Don't you concede any advantage? If you don't concede any advantage, we won't discuss that point.

A. It is just simply the way the thing works out. Suppose I had carried this lid over here and completely closed it.

Q. You say, then, that there is no advantage in the presence of that open channel in the Mogul machine?

A. It has to be there due to the way the thing is designed. [76]

Q. But what I am asking you is is there an advantage or isn't there any advantage in that particular design of construction.

The Court: The open part.

A. No; I don't see any advantage.

Q. By Mr. Huebner: You don't?

A. No.

Q. Is there any advantage in making the gas head and the wire feeding mechanism of the Mogul in separate units?

(Testimony of Charles Boyden.)

A. There is for the reason I gave, that you can get an aluminum head and a bronze valve seat that stand up.

Q. I want to refer you to a statement in *The Metallizer*——

A. I know. You mean about the gas channels, don't you?

Q. What do you want to say about that?

A. I only know of one record, or we only have one record, of a gun that ever gave us any trouble in that respect and that was a gun that was being tested in our shop and the channel leaked and it blew a lid off of the gun.

Q. Here is a statement in *The Metallizer* Mid-winter issue for January, 1936: "The complete separation of the gas head and wire feed mechanism is an insurance against combustible gas mixtures working back into the enclosed gear case through gas mixing channels drilled in the gear case proper."

[77]

A. Well, that is true.

Q. There is another place I would like to call to your attention.

"One feature worthy of note is that the wire feed mechanism and gas head, while attached to each other, are in reality separate units. This departure from the conventional reduces the replacement cost in case either assembly is damaged——"

(Testimony of Charles Boyden.)

A. That is true.

Q. —“and furthermore permits of a better combination of metals being used for the construction of these parts.”

A. That is what I said about the aluminum head and the taper valve being of bronze; that it was a better combination of metals.

Q. In the Mogul gun, if there should be a backfire in the open channel, it would be harmlessly dissipated, wouldn't it?

A. Yes; that is very true. When there is an improper combination of gases here, there is a backfire goes down into the channel in here. Our mixing point is right about here on this gun. The gas comes in here and comes down here and this is the oxygen channel comes in here, and then the channel goes up to where it comes out of the front but the mixing takes place right in there. So there is no backfire that could—or a backfire couldn't go into the gun anyway. [78]

Q. Isn't it possible that in operation there may be a leakage of gas back through the bore into this area which is defined by the channel?

A. There could be a leakage; surely.

Q. All right. Let's distinguish between the backfire and the leakage. If there is a leakage back into this area here and it is ignited, the channel being open will allow the fire to dissipate in the air, won't it?

A. Surely.

(Testimony of Charles Boyden.)

Q. Without harm? A. Yes.

Q. Whereas, if this area were closed as it is in the metallizer and there was a leakage and accumulation of gas in the pocket here, there would be an explosion, wouldn't there? A. Probably.

Q. And has been to your knowledge, hasn't there?

A. In one case but not due to that condition. In the metallizer the explosion I referred to blew this lid off. There is a channel comes up in here and it was a defective casting that comes right up in there. As I say, it was a defective casting and, when the gun was closed, the gas leaked into the case and it blew up.

Q. Do you still manufacture and sell the metallizer? A. We do.

Q. At what retail price? [79]

A. Is that important?

Q. It is; yes.

Mr. Litzenberg: I object to that. I don't see any reason for that. That is immaterial at this time. A. \$350.

Q. By Mr. Huebner: And sometimes \$250, isn't it? A. We sell reconditioned guns for that.

Q. Don't you sell new conditioned metallizers sometimes for \$250?

A. We may possibly. I don't know. But that is the retail price, \$350.

Q. What is the retail price of the Mogul?

A. \$500. These guns are sold now for a certain

(Testimony of Charles Boyden.)

very fine coating that they give, finer than we can get with the other one.

Q. You consider the Mogul gun as your best product, don't you? A. Oh, yes; surely.

Mr. Huebner: That is all.

Mr. Litzenberg: Just one or two questions.

[80]

Recross Examination

Q. By Mr. Litzenberg: Has any attempt been made to make these lids gas tight? A. No.

Q. So there wasn't anything very unusual in the fact that that was blown open? A. No.

Q. Would you consider the danger element in this gun of any consequence?

A. It was passed by the Board of Underwriters.

Q. This machine was passed by the Board of Underwriters? A. Yes, sir.

Q. And is that true of this one? A. Yes.

Q. So that they have both been passed by the Board of Underwriters? A. Yes, sir.

Mr. Litzenberg: I think that is all.

The Witness: The little gun in 1935 and this one in 1936.

Mr. Huebner: That is all. If the court please, the plaintiff has under subpoena Mrs. Kunkler, and while I don't know the lady, I think she is present in court, and I desire to inform her at this time that her testimony will not be required, in view of Mr. Boyden's testimony, so that, so far as the plaintiff is concerned, she may be excused.

Call Mr. Udell. [81]

GEORGE STANLEY UDELL,

called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Huebner: Will you state your full name, please? A. George Stanley Udell.

Q. And your residence?

A. 3141 South Center Street, Arcadia.

Q. How long have you lived there, Mr. Udell?

A. Approximately 6 years.

Q. What is your business or occupation now?

A. Plumber.

Q. For whom do you work?

A. Belvedere Plumbing Company.

Q. Have you any interest in the litigation pending here in this court? A. No.

Q. You are not employed by either of the parties to the litigation, are you? A. I am not.

Q. Were you at any time employed by the Metal Spray Company? A. Yes, I was.

Q. And were you at any time employed by the Metallizing Company of America, Inc.? [82]

A. I was.

Q. Will you state to the court the approximate periods during which your employment occurred with these two concerns?

A. I was employed by the Metallizing Company of America from some time in 1933 until 1937.

Q. Then when did you go to the Metal Spray Company? A. In December of 1937.

(Testimony of George Stanley Udell.)

Q. Was there any period between those two employments when you were working elsewhere?

A. No. There was only about a week between the two.

Q. What was the occasion of your leaving the employment of the Metallizing Company of America and going to the Metal Spray Company?

A. Well, it was more or less a personal quarrel.

Q. Between yourself and somebody in the Metallizing Company? A. Yes.

Q. How long did you stay with the Metal Spray Company? A. Slightly over a year.

Q. And what was the occasion of your leaving that company?

A. Well, I would say several things; not sufficient work; not being able to accomplish the particular jobs I set out to do.

Q. During your period of employment in both of those companies what were you hired to do?

[83]

A. Well, with the Metallizing Company I was considered an operator, and also to work on guns, repairing them, and testing them for use, along with job work that was done in the shop. With the Metal Spray Company I did spraying in the shop, and sold equipment for them.

Q. In your work for those two companies did you operate the Metallizer gun?

A. Yes, I did.

Q. Did you operate the Mogul?

(Testimony of George Stanley Udell.)

A. Yes, I did.

Q. Did you operate the Metal Spray gun?

A. Yes.

Q. Exhibit 5? A. Yes.

Q. When you say you were an operator, by that do you refer to demonstration of the guns, or did you work in the shop spraying metal?

A. I did both.

Q. Now, have you any personal observations to make in regard to the superiority or inferiority of, we will say, the Mogul gun over the Metallizer, based on——

Mr. Litzenberg: We object to that on the ground that no foundation has been laid to show that this man is an expert or is qualified to give expert opinion.

Mr. Huebner: He is not being interrogated, your Honor, as an expert, but as a practical man, a fact witness and [84] practical man in the field.

The Court: Are you familiar with the operation of each of the guns?

A. I am.

Q. And you have operated them many times yourself? A. Yes.

The Court: Well, you can describe the differences in the operation and the effect of it, as you saw it.

A. Well, a Mogul gun is naturally a much nicer gun to operate than the Metallizer. It is more sure, and you know, when you are going to light the gun,

(Testimony of George Stanley Udell.)

you are more sure it is going to light and operate correctly, where, with the Metallizer, there is always some margin of doubt that something might not work as it was supposed to.

Q. Are you familiar with any instances where difficulty was encountered with the Metallizer?

A. What type of difficulty? What type of difficulty do you refer to?

Q. Well, backfire, or explosion, or some kind of uncalculated, unexpected firing.

A. Yes. You will find in any type of metal spray equipment there has been lots of cases where back-fire occurred.

Mr. Litzenberg: I believe the question was for a specific case.

A. I have a specific case in mind, if the court wishes, [85] where the gun backfired and blew the lid off, and other cases where, in the same shop, that could be named specifically, where the gun backfired, but no particular damage was done.

Q. By Mr. Huebner: Now, in that instance where the lid blew off, was any damage done to the gears in the case?

A. There was no damage done to the gears. However, the part that held the lid on was broken and let the lid fly off.

Q. Was there any injury to the operator of the gun?

A. No; the operator escaped any injury.

Q. How high in the air did the lid blow?

(Testimony of George Stanley Udell.)

A. Well, I would say maybe 15 feet.

Q. In your experience does that Metallizer gun allow accumulation of gases in the pocket at the lower part of the operating housing, operating unit housing?

A. Well, there is a chance that it could. However, I have never actually tested the guns to see if there were gases in there, but there is a possibility that they could, I suppose.

Q. Did you yourself, in your operations, observe any particular precautions with regard to the use of that Metallizer?

A. All operators were instructed to take precautions, that there must be wire in the gun before it is attempted to be lit. [86]

Q. Why is it necessary in the Metallizer to have wire in the gun before lighting it?

A. Because the passage that the wire travels through goes right back into the gear case, which is confined, and gas could go right back in there and cause an explosion.

Q. Is that same precaution necessary in the Mogul? A. No, it is not.

Q. Is it necessary in the Metal Spray gun?

A. It is not.

Mr. Huebner: You may cross examine.

Cross Examination

Q. By Mr. Litzenberg: Mr. Udell, you heard Mr. Boyden's testimony, did you? A. I did.

(Testimony of George Stanley Udell.)

Q. And the incident that he referred to, where the lid was blown open, is the same incident to which you referred? A. That is right.

Mr. Litzenberg: That is all.

Mr. Huebner: That is all. Mr. Leder, will you please take the stand? [87]

PAUL ALBERT ERNEST LEDER,

called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Huebner: Please state your full name. A. Paul Albert Ernest Leder.

Q. Where do you live, Mr. Leder?

A. Alhambra.

Q. And what is your address there?

A. 2508 Aurora Terrace, Alhambra.

Q. In what business or occupation are you engaged?

A. I am at present employed by the Metal Spray Company.

Q. How long have you been employed by them?

A. Since the beginning of—well, I have been employed periodically. The last time I was employed about April, 1937.

Q. You are one of the plaintiffs in this case, are you not? A. I am.

(Testimony of Paul Albert Ernest Leder.)

Q. Are you one of the joint inventors or applicants of the patent in suit? A. Yes, sir.

Q. Do you and Mr. Lensch at the present time own the patent? A. Yes, sir.

Q. And have you owned the patent at all times since it [88] was issued? A. We have.

Q. Have you granted a license under the patent to the Metal Spray Company, to manufacture these guns? A. We have.

Q. And has the Metal Spray Company paid you a royalty on the guns manufactured and sold?

A. Yes, sir.

Q. Is Mr. Lensch present in court?

A. No.

Q. I understand that he is ill. Do you know anything about it?

A. Well, he claims he has a heart sickness and can't walk very far. He gets out of wind.

Q. Now, on the guns manufactured by the Metal Spray Company under their license with you, has there been any patent mark of any kind placed?

A. Every gun going out of the Metal Spray Company has been stamped with the patent number, since we have obtained the patent.

Q. Do you find that marking on the gun which is in evidence? A. It is marked there.

Q. What does it say there on the gun? [89]

A. Patent No. 176,632, and the following number is 1,987,016, and on this gun it says, "Other

(Testimony of Paul Albert Ernest Leder.)

patents pending.” In other words, this gun had been manufactured before the patent was issued.

Q. You were reading, I take it, from this little metal—— A. Name plate.

Q. ——name plate? A. Yes, sir.

Q. Somewhere else on this gun do you find the patent number of the patent in suit?

A. It is patent No. 2,098,119—2,096,119.

Q. And that was put on, was it——

A. It has been put on since we have obtained the patent from the Patent Office.

Q. Did you make any practice of recalling the guns, as far as possible, that had been sold previous to the patent, and putting the numbers on, and returning them to the owners?

A. We have tried to stamp every gun which we could get hold of.

Q. What is the retail selling price of the Metal Spray gun? A. \$500.

Q. Do *you about* how many of these have been sold? A. Well, I only can guess. [90]

Q. Well, I don't want you to guess, but if you know approximately how many that will be sufficient at the present time.

A. Well, I would say between 150 and 200.

Mr. Huebner: You may cross examine.

Cross Examination

Q. By Mr. Litzenberg: Mr. Leder, referring to your first patent, 1,987,016, were you a joint inventor in connection with that invention?

(Testimony of Paul Albert Ernest Leder.)

A. That is right.

Q. How long after the manufacture of that machine was it before you worked out the improvement that is embodied in the later patent?

Mr. Huebner: Just a minute. That is objected to as having no foundation in the direct testimony. He didn't say he had ever manufactured this gun. And that is objectionable on several other grounds.

Mr. Litzenberg: They have referred to it and marked the guns being sold with the numbers of both of these patents, and therefore they are assuming that the gun which they are selling in the market is covered by the patent.

The Court: Let him answer first, why did you put the two numbers on the articles?

A. Well, I believe that this patent here, with some [91] features, like the nozzle, was patented, which is incorporated in the later patent, in the later model gun, and furthermore the passages of gases that comes right to the handle was patented in this case, and therefore I believe that the same features are incorporated in the other gun there, and therefore I put the patent numbers on there.

Q. Now then, my question was, how long after the making of your invention did you produce the one that you are now selling?

Mr. Huebner: I object to that on the ground that it is ambiguous. He says "produce." Does he mean invent, does he mean manufacture and sell, or what does he mean?

(Testimony of Paul Albert Ernest Leder.)

Mr. Litzenberg: It is very easily explained.

Q. By Mr. Litzenberg: How long after the manufacture of the first spray gun did you make one of these spray guns that you now sell?

Mr. Huebner: Just a minute. He hasn't testified that he manufactured any other gun.

The Court: Did you make any guns under the first patent?

A. We did.

The Court: And sell some?

A. Yes.

The Court: All right.

Q. By Mr. Litzenberg: When did you make your first ones under the second patent? [92]

A. During the time the guns were made under the first patent, Lensch and myself tried to improve the gun, and finally the construction of this gun was worked out.

Q. Approximately how long was it until you worked that out, from the time the first one was manufactured? A. The first one of these?

Q. Yes.

A. It is hard to say. It is a good many years ago.

Q. This patent was issued in 1935, January 8, 1935. A. Yes.

Q. Now, was it in 1935 or before or after that you worked out this improvement?

A. No. It was before 1935.

Q. It was before 1935? A. Yes.

(Testimony of Paul Albert Ernest Leder.)

Q. How long before?

A. It may be a month or a year before this time. It is pretty hard to say after this length of time has elapsed.

Q. You are not certain, then, as to how long after you completed the device for which you have the first patent that you perfected the invention of the second patent, that is, the one that you sell now?

A. Well, as to the perfection of it, that is a long—as far as I can see, I don't think any metal spray gun was perfect.

Q. I refer to the first machines of the type in the [93] second patent which you manufactured and sold, the very first ones, as disclosed there.

A. The first of those guns was finished somewhere around May, 1934.

Q. May of 1934? A. Yes.

Q. Did you make any changes in it after that?

A. Since then we have made changes.

Q. In what respect? Would you please state briefly just what changes you have made?

A. We have changed the combustion unit. We have changed the top latch; we have changed the design of the feeding wheel, the wire feeding wheel, and a slight change has occurred in the design of the moving parts on the inside, the gear and shaft.

Q. But substantially it is the same machine that you made in May of 1934?

A. It has the same appearance.

Q. Does it have the same functions?

(Testimony of Paul Albert Ernest Leder.)

A. The same functions.

Q. Performing the same functions in substantially the same way? A. Yes, sir.

Q. It has the separated power plate and the separated gas plate? A. That is right. [94]

Q. Did it have the open channel, so that the feed of the wire was visible? A. It had.

Q. And did it have the means for yieldingly holding the upper feed roll in contact with the wire?

A. Yes, sir.

Mr. Litzenberg: I think that is all.

Redirect Examination

Q. By Mr. Huebner: Mr. Leder, I just want to clear up this one point. I understand from your testimony on cross examination that the Metal Spray gun, plaintiffs' Exhibit 5, in all its essentials, was in your possession about May of 1934. Was that your statement? A. That is right.

Q. And you weren't then talking about the earlier guns made under the other Lensch and Leder patent No. 1,987,016? A. No.

Mr. Huebner: That is all. May it please the court, we have an expert witness who is prepared to describe to your Honor, if you please, the patent in suit, and make a comparison of elements of the patent in suit with the defendants' accused gun, the Mogul. I don't want to impose upon the court. We have prepared it and are ready to proceed along those lines, and if your Honor feels that it is not

(Testimony of Paul Albert Ernest Leder.)

necessary at this point to make that comparison we will act [95] accordingly and not put the witness on the stand.

The Court: Well, I think I understand the entire thing to date. If you want to go into that detail I am willing to hear this testimony. The difficulty is that expert testimony runs into a lot of space and sometimes does not do much good. On the other hand, I have heard counsel say that in the event of an appeal they want the expert testimony in the record. So I have no fault to find, unless you take too much time with the experts.

Mr. Huebner: In view of your Honor's comments, I think we will not put the witness on the stand. If it appears necessary, we can do so in rebuttal.

The Court: Very well.

Mr. Huebner: With that, the plaintiff rests.

The Court: We will have a short recess for about 10 minutes. We will adjourn at 4:30 this afternoon, gentlemen.

(Short recess.) [96]

DEFENSE

Mr. Litzenberg: If the court please, I have been a little bit surprised that Mr. Huebner would take so much of our time in describing the art and the general mechanisms in regard to spray guns, in

view of the history of the prosecution of the application on which the patent was issued, that is, the patent sued on. The practice of spraying metal on surfaces, of course, was invented a great many years ago, and the various means of accomplishing it were developed step by step, and a good many things were invented in foreign countries for accomplishing this, even before it came to the United States. So, as he said, the patent sued on is not a pioneer patent, but is a very secondary patent, and we have denied that it involves invention, what was accomplished over the prior art. We have denied that other than mechanical skill was required to produce the invention on which the patent was issued, especially in view of the teachings of the prior patents and the prior art, and particularly having in mind the applicants' own machine which they invented. And we have also denied, that is, we have also alleged that the machine which was finally patented was produced and was offered for sale and manufactured more than two years prior to the filing date of the patent, of the application on which the patent issued. And, as I have one or two witnesses who are very busy, and who wish to get away, and I wish to [97] finish with them this afternoon, I am going to present that defense at this time, and will call Mr. Britton.

Mr. Huebner: Just a minute. If your Honor please, if I understand counsel's statement correctly, he is proposing to show that there was prior

knowledge or use or sale of the patented invention. Is that correct?

Mr. Litzenberg: That is right. It was offered for sale more than two years prior to the filing of the application.

Mr. Huebner: By whom?

Mr. Litzenberg: By the applicants.

Mr. Huebner: Then I object, your Honor, to the introduction of any testimony or offer on that line, because such is not pleaded in the answer.

Mr. Litzenberg: I think if you will read the answer you will find that it was.

Mr. Huebner: But, Mr. Litzenberg, you have got to give us names and circumstances, in accordance with the statute. There is no notice whatsoever in the answer that this defense which he now sets up was going to be used as a defense in the case. There isn't the slightest hint there. The answer is in general terms and in ordinary form, and he proposed, according to the answer, to later submit dates and details, but he never did it.

Mr. Litzenberg: Under the new rules I think there is sufficient allegation to present the evidence that I am [98] proposing to submit at the present time. If you want to object to it at the time, that is all right.

Mr. Huebner: Well, I don't even want to launch into that phase of the defense, because I contend that, not having been pleaded, under the statute, and no notice having been given us, no evidence whatsoever relating to it can be offered.

Mr. Litzenberg: Well, I guess I will have to disagree with you on that. I guess it is for the court to rule. The answer, it seems to me, gives sufficient notice, sufficient warning, that that defense will be urged. Let me read that part of paragraph 4:

“Deny that they were entitled to a patent therefor under the provisions of the statutes of the United States, but admit that they made application on April 13th, 1936, to the Commissioner of Patents of the United States for letters patent for said alleged improvements, and deny that such alleged improvements were not known or used by others in this or any foreign country before their alleged invention or discovery thereof; and deny that said alleged improvements were not patented or described in any printed publication in this or any foreign country before their alleged invention or discovery thereof, or for more than two years prior to said alleged application for patent; and deny that said alleged improvements were not in public use or on sale in this country for more than two years prior to said alleged [99] application; and deny that said alleged invention had not been abandoned to the public.”

There is the allegation where we deny that it was not in public use or on sale in this country more than two years before the said alleged application.

And I contend that that is sufficient, under the new rules of procedure, to present evidence to show that they, even themselves, had it in public use and on sale more than two years prior to the application.

Mr. Huebner: That, your Honor, is a special defense, the denial of the affirmative of which in the answer never has been considered as setting up that as a special defense, and I submit that even under the new rules there is no waiver of that obligation on the part of the pleader.

The Court: I will be glad to hear you on it. The prior art that you claim to completely anticipate must be specifically pleaded, under the old rules. Whether under the new general rules a general denial will open the door I am not sure. I am not certain about that.

Mr. Huebner: I wasn't anticipating a debate on this point, and I have no authorities with me. If your Honor desires to have it briefed or argued, I am perfectly happy to do it.

The Court: I don't want to delay the trial.

Mr. Litzenberg: Perhaps we can pass this.

The Court: I would be inclined to allow an amendment [100] to specifically plead it and allow you to meet it, if counsel chooses to take that route and file an amendment. Then, if you choose to answer, I will allow that, within a few days.

Mr. Litzenberg: Well, if that is the only procedure under which this can be introduced, I certainly would appreciate it and would ask for that privilege.

The Court: I would suggest, then, that first you state particularly what you are expecting to prove, and then counsel on the other side may challenge it and meet that situation.

Mr. Litzenberg: We expect to introduce correspondence, letters, circular letters, that were sent out to the dealers, announcing the new machine, as early as April 5, 1934, the man who received the letter and the man who wrote the letter, and, in connection with the letter, the circular, bulletin No. 500, which was referred to in the letter, and which clearly shows the invention as we have it presented here as an exhibit. [101] Now, if this particular defense can be delayed, I am perfectly willing to go ahead and put on the other defense, leaving only this one particular phase of the defense, if that is permissible, for a later date.

The Court: Well, if it refers only to the sending out of the circular letter, possibly you can reach an understanding on that issue.

Mr. Huebner: Probably not, your Honor. However, I think that we should have further particulars in accordance with the requirement of the statute, as to who is alleged to have had that knowledge, and their addresses. I would like to be able to prepare to meet this unexpected defense.

Mr. Blount: And also time in which to do it.

The Court: That is the only special matter?

Mr. Litzenberg: Yes, that is the only special matter. The men are here in court at the present time, the sender, writer of the letter, and the man

who received the letter. And they are in the position of those who were offering these inventions to the public and sending out the bulletins which had been prepared for that purpose, and which definitely disclosed the invention that was made the subject matter of an application more than two years afterwards.

Mr. Huebner: I am asking you to state now, so that we can prepare to meet it, the name or names of individuals whom you say had this knowledge.

[102]

Mr. Litzenberg: Well, Mr. William M. Britton. Mr. Britton, will you give your address?

Mr. Britton: 1741 $\frac{1}{2}$ West 46th Street, Los Angeles.

Mr. Litzenberg: And Mr. H. B. Rice, the man who wrote the letter. Will you state your address, Mr. Rice?

Mr. Rice: 3835 Pine Street, Long Beach.

The Court: Those are all?

Mr. Litzenberg: Yes, sir.

Mr. Huebner: May I have the date of the letter and to whom it was addressed?

Mr. Litzenberg: Dated Los Angeles, California, April 5, 1934, subject, New Type Gun, addressed to all distributors and agents.

Mr. Huebner: Well, to whom did the particular letter go that you are intending to offer in evidence?

Mr. Litzenberg: It was mailed to Mr. Britton, who received it and had it in his possession. And

there was a personal note in longhand, written in ink, addressed by Mr. Rice to Mr. Britton, the letter being signed by Mr. Rice.

Mr. Huebner: That is the full extent of the material that you propose to offer on this special defense, is it?

Mr. Litzenberg: On that particular defense.

Mr. Huebner: Are there any other defenses that are not pleaded in the answer that you are going to offer?

Mr. Litzenberg: No; nothing but what has been specifically stated. [103]

Mr. Huebner: May I confer with my associates for a moment, your Honor?

The Court: Yes.

Mr. Huebner: Do you object to us looking at the letter, Mr. Litzenberg? I haven't seen the letter.

Mr. Litzenberg: No. I have a copy of it here that is a little easier to read. You may compare it if you wish.

(Short interim.)

Mr. Huebner: May it please the court, there is so much in this letter that we can't digest it in this brief space. I still think that we are entitled to the 30-day notice but I see no point in insisting or urging that upon the court. And I believe that, if we adjourn until day after tomorrow, that will give us an opportunity to look into it.

The Court: You may proceed with the other proof that you have.

Mr. Huebner: I should like to look over that letter at my leisure, if I may. You have an extra copy, have you?

Mr. Litzenberg: Yes. Then we might excuse Mr. Britton and Mr. Rice?

The Court: Yes. Shall I instruct them to return day after tomorrow morning?

Mr. Litzenberg: Yes; day after tomorrow morning. You may be excused until then, Mr. Britton and Mr. Rice. [104]

At this time I would like to introduce the file wrapper of the Lensch and Leder patent No. 2,096,119. [105]

I introduce this file wrapper and will ask that it be marked Defendants' Exhibit A.

[Clerk's Note: Defendant's Exhibit A is set forth at the end of Reporter's Transcript--page 380 of this printed record.]

I think at this time I will introduce some of the prior art, which I have cited in my answer, in order that it may be marked.

I would like, first, to introduce a French patent No. 741,740, a patent which was filed in November of 1931 and [109] which seems to have issued in December of 1932, in which there is a spray gun, shown in the drawings, with an open channel whereby the feed wheels are clearly shown, with the wire passing therebetween, with the motor and the feed mechanism in alignment with the nozzle through which the wire is fed. May that be marked?

The Clerk: Defendants' Exhibit B.

Mr. Litzenberg: I have a white copy of that, which we present, but I think the photostatic copy will be sufficient. If reference is desired to be made to the white copy, it may be a little clearer. Maybe I had better introduce the white copy instead of the photostat.

Mr. Huebner: Is there a translation attached to the copy?

Mr. Litzenberg: I have a translation here but I don't care particularly to make any particular use of the translation. I doubt very much if it adds to it. However, I will attach the translation as a part of the exhibit for whatever use it may have.

I next introduce a French patent No. 680,554, which was filed in December of 1928 and issued in January of 1930, in the drawings of which there is exhibited a metal spraying machine in which there is a housing, with a power plant in a separate compartment or housing, and a gas plant in another housing, with a chamber therebetween, with the feed wheels for feeding the wire through the machine and through [110] the nozzle.

Mr. Huebner: Is there a translation of that patent?

Mr. Litzenberg: I do not have a translation of that, Mr. Huebner.

Mr. Huebner: It seems to me that the court would require a translation.

The Court: Yes; I would like to have one for

the record in some way, either by a witness' testimony or otherwise.

Mr. Huebner: I, therefore, object to the introduction of the patent unless it is accompanied by a translation.

Mr. Litzenberg: The drawings, of course, are clear to mechanical men and our plan is to present witnesses to explain the drawings as shown in the French patents.

Mr. Huebner: The drawing is only a part of the patent and I submit the exhibit is not competent without a translation.

The Court: I think that is correct unless you call a witness who can translate it from the stand for the record. I will admit it provisionally and you may follow it up by further proof.

Mr. Litzenberg: Then, to save time, we will submit it at this time for identification.

The Court: Yes.

The Clerk: Defendants' Exhibit C for identification.

Mr. Litzenberg: Next, I will introduce French patent [111] No. 639,039 under the same provisions.

Mr. Huebner: That is, there is no translation accompanying it?

Mr. Litzenberg: There is no translation accompanying it.

Mr. Huebner: The same objection.

The Court: Yes; with the same understanding. It may be introduced for identification.

The Clerk: Defendants' Exhibit D for identification.

Mr. Litzenberg: Next, a British patent No. 440,-248, of 1934, convention date in Germany July 25, 1934, and application dated in the United Kingdom July 22, 1935, for an improvement in and relating to metal spray pistols. I will ask that that be marked.

The Clerk: Defendants' Exhibit E. Is that in evidence?

The Court: Yes.

Mr. Litzenberg: Also, British patent No. 268,-431, of 1927, also for an apparatus for applying coatings or deposits of fusible substances to surfaces.

The Clerk: Defendants' Exhibit F.

Mr. Litzenberg: Next, I will introduce United States patent No. 2,102,395, issued to Valentine on December 14, 1937.

The Clerk: Defendants' Exhibit G.

Mr. Litzenberg: The patent which was cited by the Patent Office, the patent issued to Irons, No. 1,917,523, of July 11, 1933, I offer in evidence. [112]

The Clerk: Defendants' Exhibit H.

Mr. Litzenberg: Next, a patent to Schoop No. 1,617,166, issued February 8, 1927, a device for coating articles with glass, enamel, quartz and metals.

The Clerk: Defendants' Exhibit I.

Mr. Litzenberg: I think I will also introduce a patent to Morf, which I have referred to, issued

February 9, 1915, No. 1,128,175, for a method of producing bodies or small particles of substances. This is one of the early patents issued in the United States in the development of this art and teaches much in regard to spraying or atomizing metals onto surfaces.

The Clerk: Defendants' Exhibit J.

Mr. Litzenberg: I think you did not introduce your first Leder patent, did you?

Mr. Huebner: No.

Mr. Litzenberg: I will also introduce the first patent to Lensch and Leder No. 1,987,016, issued January 8, 1935. This is the patent in regard to which Mr. Leder testified.

The Clerk: Defendants' Exhibit K.

Mr. Litzenberg: I will call Mr. Boyden. [113]

CHARLES BOYDEN,

recalled as a witness on behalf of defendants, having been heretofore duly sworn, testified as follows:

Direct Examination

Q. By Mr. Litzenberg: Mr. Boyden, you are one of the defendants in this suit?

A. Yes, sir.

Q. What is your present business?

A. Manufacturing metal spraying equipment.

Q. How long have you been engaged in the manufacturing of spraying equipment?

A. Eight years.

(Testimony of Charles Boyden.)

Q. Please give just a little history of your first experience and bring it up to date just briefly to save time.

A. Do you mean the metal spraying business?

Q. Yes.

A. Well, I started in in 1929 in a shop which was doing custom work only. I mean job shop work. And in 1931—or all through this time we were having a lot of trouble with the guns. They didn't operate properly. So we decided to make a gun of our own.

Q. You say "we".

A. Well, the company. So we brought out this gun here, this little metallizer gun. And at the same time we decided that we would put it on the market because the [114] patents were running out. I mean the gun patents were running out. They ran out in 1932. Anyway, we brought the gun out shortly after the patents ran out. And from then on it went along until in 1935, very early in 1935, when I started to get out the Mogul and then, in 1936, we brought it out for sale.

Q. When you refer to this gun you have reference to Plaintiffs' Exhibit No. 6? A. Yes.

Q. Is this the one you picked up?

A. That is the metallizer. Did you give it a number here?

Q. Yes. Is that the one you started to manufacture? A. That is the first one.

Q. In referring to it, it was not identified. But

(Testimony of Charles Boyden.)

you refer to the one marked Plaintiffs' Exhibit No. 6, do you? A. Yes.

Q. Following that, you developed the Metallizer, or I mean the Mogul?

A. The Mogul came along about four years later.

Q. I am going to hand you what purports to be a spray gun and ask you if you have ever seen this before. A. I have.

Q. Where did you first see that?

A. Oh, that was traded in for one of our other guns. It is a French gun, covered by the patents that are over [115] there, or one of the patents?

Q. You refer to French patent No. 680,554, do you?

Mr. Huebner: I object to this question unless this physical specimen of gun which the witness has is identified as to date and other circumstances.

Mr. Litzenberg: We will introduce all that we have in regard to this.

Mr. Huebner: But I am insisting upon and urging an objection.

The Court: He said it was traded in. They want to know when.

Mr. Litzenberg: I will develop that but I am developing that this patent is the same as this gun.

Q. Is it the same as that French patent?

A. Yes; it is. [116]

Mr. Huebner: That calls for a conclusion and

(Testimony of Charles Boyden.)

that is what I am objecting to. And I move to strike the witness' remarks.

Q. By the Court: Do you understand the internal mechanism of that model?

A. Yes, sir.

Q. And do the drawings in that patent represent what you understand to be the internal and external mechanism?

A. Yes, sir.

The Court: All right.

Q. By Mr. Litzenberg: Now, Mr. Boyden, I will ask you to just explain how this gun first came to your attention and how you came to come into possession of it and when that was.

A. Well, I don't know that. I don't know when we got the gun in but it was a trade-in from some company that was using this gun and bought one of our other guns, one of these guns.

Q. You refer to what?

A. Exhibit 6.

Q. The metallizer?

A. I am not sure but I think it was a firm down in Louisville, Kentucky, that makes toilet equipment. I think it was the American Sanitary Plumbing Company. Is there such a thing or the Sanitary Plumbing Company?

Q. We wouldn't know about that. Explain as nearly as [117] you can when this came into your possession.

A. I don't know, Mr. Litzenberg.

Q. Was it within a year or more?

A. Oh, no. It has just been a couple of years, two or three years.

(Testimony of Charles Boyden.)

Q. Did you have any representatives in foreign countries?

A. Well, we had an exporter that had representatives in foreign countries, Mr. Gossner.

Q. How did you get hold of this French patent?

A. Through him.

Q. He sent you a copy of the French patent?

A. He sent us copies of a number of French patents right after he took over our export business. He had his agents in Germany, France and Switzerland and around there to look up patent matters.

Q. In other words, he was selling the metallizer?

A. That was the gun he took on first.

Q. And he sent you these French patents which we have introduced today?

A. The patents that you have put in here, those foreign patents, were sent to me by Mr. Gossner.

Q. And he was your agent, selling your metallizer? A. Yes. And he still is.

Mr. Huebner: I object to this line of examination as irrelevant and immaterial. It doesn't seem to touch on any issues, your Honor. [118]

Mr. Litzenberg: We feel, of course, it is very vital and I am not surprised that you object to it because we shall show that this French patent which was issued away back in 1930 and filed in 1928 is identical with this particular machine and that this particular machine has all of the mechanical elements embodied in your exhibits here, including a

(Testimony of Charles Boyden.)

separate chamber for the power plant and a separate chamber for the gas plant.

Mr. Huebner: But why all of the history of how he found it out and that he had an exporter there and got hold of the patents and all of that?

Mr. Litzenberg: Then, why all of the history in regard to the preliminaries in regard to the first presentation of this subject matter?

Mr. Blount: As to your assertions, Mr. Litzenberg, that it is the same, are you testifying as an expert or is that your opinion?

Mr. Litzenberg: I am doing just exactly what Mr. Huebner did in regard to the art.

Mr. Blount: We question the assertion and say that it is a conclusion on the part of counsel.

Mr. Litzenberg: I said we would show it.

The Court: Proceed. I don't believe that the fact history is important on that. You have the machine here and you have the patent.

A. Yes, sir. [119]

Q. By Mr. Litzenberg: Will you please explain this mechanism in your own language, Mr. Boyden, making as many comparisons of this structure that you hold in your hands as you can with the exhibits that are on the blackboard?

A. The turbine housing is here and in this side is a gear housing over here, the same as they have a gear housing. There is a channel in between the two here, the same as they have a channel. The shaft projects from the gear housing through and

(Testimony of Charles Boyden.)

carries the feed rolls and gears. Those are the principal things.

Q. And about the gas, what about the gas?

A. Well, there is nothing about that. This is just a valve here.

Q. It has the nozzle and all the rest of it?

A. Yes.

Q. Then, describe all of the rest of it.

A. It has the gas head. The gas channels are in the case here. This gas head comes off where the mixing takes place and it has the air cap and wire nozzle.

Q. Had it a pivoted feed wheel?

A. Well, I guess it would be considered a pivoted feed wheel and a pressure plunger here to cause engagement.

Q. What other features would you say are similar to the gun of the patent in suit?

A. That is about all there is. The housings here are separate. There is a passageway in between or channel, [120] if you want to call it that.

Q. Are the feed wheels visible during the operation of the machine? A. No.

Q. In order to inspect the feed wheels and the wire as it is fed through the wheels, you must stop the machine, open the cover and inspect it, is that right?

A. Yes; I would think so, if you want to give a good inspection.

(Testimony of Charles Boyden.)

Q. And did you have that machine in your possession, that is, did you have this machine, the French machine, in your possession and have knowledge of it before the development of the Mogul?

A. No.

Q. Did you have any knowledge of it?

A. Oh, I had the patents on it.

Q. You had the patents on it? A. Yes.

Q. But you did not have the machine?

A. No.

Q. Did you get any ideas from the French patent, sent to you by your agent, which in any way contributed to your development of the Mogul?

A. Some; yes.

Q. I wish you would make comparison of any features which you found in the French patent.

[121]

A. Well, the housings are housed in here. I mean the worms and gears in here are all housed in, which is the principal thing that I was interested in.

Q. I notice that your main casting is very much like the drawings, that is, it is closed on practically all sides. A. Yes.

Q. That was somewhat different from the Metallizer. Now, in the development of the Mogul machine, how did it come that you did not use the closure or lid on which the upper feed wheel was supported but, instead, adopted a lever such as you have in the Mogul? Is there anything in connec-

(Testimony of Charles Boyden.)

tion with that development which you can explain at this time?

A. Well, there is no reason to put a lid over it. There is nothing gained.

Q. Is there a reason for not doing it?

A. Well, I wouldn't say there is any reason for not doing it, either.

Q. You didn't have in mind an effort to make visible the mechanism in the channel between the power plant and the gas plant? A. No.

Mr. Huebner: Just a minute. That is objected to as leading.

The Court: He may answer whether that was one of his objects. [122]

A. No; that was no object at all. You might say here, now, why didn't I hood this on over here so I couldn't see the gears. What is to be gained by doing it? And what is to be gained by looking at the gears?

Q. By Mr. Litzenberg: It is practically impossible for you to inspect the feed wheels and the feed gears and the wire within the channel during the operation of the Mogul gun, is that correct?

A. Well, unless you get in some twisted-around position there.

Q. I mean in practical, normal operation.

A. Oh, no; you couldn't see it.

Q. It never was intended? A. No.

Q. And, in order to even see one of the lower wheels, you would have to shut off the gun and look

(Testimony of Charles Boyden.)

closely and twist it around, as we have to do as we handle it in its present condition? A. Yes.

Q. In the French gun is there any vent opening for prevention of accumulation of gas?

A. Well, nothing except this here.

Q. You refer to the latch opening?

A. The latch opening; yes.

Q. That would ventilate the chamber?

A. A little bit; not much. [123]

Q. Mr. Boyden, I show you the Valentine patent, Defendants' Exhibit G, and will ask you to explain what you find in the drawings of this patent corresponding to the mechanical elements of the Mogul machine.

A. Well, about the only thing is the gas head which appears to be removable. I mean this part here, from here out. That is hatched differently in here. That comes in here and around here and that is all removable from the case part.

Q. In other words, the gas head is shown to be removable or detachable? A. Yes.

Q. Has that a spring-pressed upper feed roll?

A. Yes.

Q. And the rear wire guide is in alignment with the feed wheels and with the nozzle? A. It is.

Q. And it has a power plant?

A. Well, this appears to be driven from an outside source somewhere.

Q. Trace it.

(Testimony of Charles Boyden.)

A. Here is the worm and gear here and a flexible shaft, it looks like to me, although I don't know. It would appear that way. The power plant is not incorporated in the gun.

Q. But it has the worm and gear drive in the housing? [124] A. That is right.

Q. And the drive gears for the two shafts which drive the wire guides? A. Yes.

Q. Did you have any particular knowledge of plaintiffs' device, Exhibit No. 5, in its present condition prior to or about the time you developed or worked on your Mogul machine?

A. I knew they had a gun. I had seen circulars of it.

Q. You had seen circulars of it? A. Yes.

Q. Had you made any study of the general art of spray guns in the way of textbooks or matter other than the patents which had been sent to you by your foreign agent?

A. No. There were no textbooks out.

Q. Is there any feature in regard to the matter of balance in your device that is any different from the plaintiffs' machine, that is not found in any of the other patents or other inventions?

A. Well, simply the balance in the end that they refer to. I am not sure whether it is a retiring position or what it is.

Q. In other words, the feature is that the power plant is on one side and the gas plant is on the other side? A. No.

(Testimony of Charles Boyden.)

Q. On opposite sides of the channel? [125]

A. No. The power plant is here and the transmission is over here and the worms and gears. This is your gas plant up here.

Q. In other words, it is balanced? A. Yes.

Q. The object in carrying the shafts through the channel to the opposite side is for the purpose of balancing the machine as it is held in the hand, is that right?

A. Well, no. Do you mean that you carry this out here a distance to get a balance?

Q. The general construction of this gives you a balanced machine, does it not? A. Yes.

Q. Which it would not if you had the drive connected up on the same side of the machine? It wouldn't be balanced in the same way?

A. Do you mean if this was off to one side or moved over here somewhere?

Q. Yes. A. Oh, no.

Q. In other words, that is simply good mechanical construction, is what I am getting at?

A. Well, it is the way it was constructed. [126]

Mr. Litzenberg: I think I will let counsel take the witness at this time. [128]

(Testimony of Charles Boyden.)

Los Angeles, California,
Thursday, May 2, 1940, 10 A. M.

(Parties present as before.)

The Clerk: Lensch vs. Metallizer.

Mr. Huebner: Ready.

Mr. Litzenberg: Ready. If the court please, in regard to the amendment to the answer, I have prepared that. I don't know whether the court has given thought to that question that I raised or not. I did not believe it was necessary under the new Rules to present evidence to support our denial of the public use and sale.

The Court: Where specific instances are relied upon and it is claimed that they are complete anticipation, they must be specially pleaded. That is my understanding, although I may be wrong about that.

Mr. Litzenberg: We will file the amendment and serve a copy.

Mr. Huebner: If your Honor please, I desire to object to the filing of this amendment to the answer or amended answer at this or any other time on the ground that it is not timely under Section 69 of Title 35 of the U. S. Code Annotated, that section requiring this particular type of notice to be given in addition to the pleading of the general issue at least 30 days prior to the trial. It is our position that, unless there is some reasonable excuse, some genuine excuse, for the defendant not

(Testimony of Charles Boyden.)

having filed it [130] 30 days prior to the trial, he is forever barred from asserting this defense. I desire to have my objection entered on the record to the amendment and to any testimony or evidence or proof of any kind directed to these defenses.

The Court: Let the objection appear.

Mr. Litzenberg: Yes, sir. We refer to Rule 8, sub-section b. "This rule supersedes the methods of pleading prescribed in the U. S. C., Title 19, paragraph 508, and also U. S. C., Title 35, paragraph 40, (proving under general issue, upon notice, that a statement in application for an extended patent is not true)", and referring especially to Section 69 and similar statutes. That is superseded by the general provisions included in Rule 8 as the general rules of pleading. [131]

The Court: In the course of time our Circuit Court of Appeals will probably pass on it. Until that time, I will allow the filing of the amendment.

Mr. Litzenberg: We will recall Mr. Boyden.

Mr. Huebner: Mr. Litzenberg, you had turned the witness over to me for cross examination. Do you have further questions?

Mr. Litzenberg: Yes; I have further questions.

Mr. Huebner: Very well. [132]

CHARLES BOYDEN,

recalled as a witness on behalf of defendants, having been heretofore duly sworn, testified as follows:

Direct Examination
resumed.

Q. By Mr. Litzenberg: Mr. Boyden, I would like to ask whether or not you ever applied for any patents on your spray guns.

A. The first I did but the one in issue here not.

Q. You never applied for a patent on that one in issue? A. No.

Q. Have you any reason to give for not applying for a patent?

Mr. Huebner: Just a minute: I object to that on the ground it is not relevant or material.

The Court: It is not unless it involves some agreement of some kind.

Mr. Litzenberg: Excepting to bring out the fact that he did not consider it involved invention.

The Court: I don't think his ex parte opinion is material.

Mr. Litzenberg: It is immaterial, I guess.

Q. In your testimony the other day, in explaining the development of your invention, you testified that you got a number of ideas from circulars, foreign circulars, which you had received from your correspondent. Who is the [133] correspondent that you referred to?

A. Mr. Gossner, our exporter.

Q. Where is he located?

(Testimony of Charles Boyden.)

A. In New York City.

Q. What is his business?

A. Export business.

Q. I hand you herewith three different circulars and will ask you if you have ever seen those before.

A. I have.

Q. Do you know where they came from?

A. From Mr. Gossner.

Q. And you have had them in your office since receiving them from Mr. Gossner? A. I have.

Q. Until the time you gave them to me?

A. I did.

Q. Now, will you please explain just briefly what each one of those circulars is?

Mr. Huebner: I object to this unless it is established that these circulars constitute part of the prior art. There is no date shown at the present time.

A. There are.

Mr. Huebner: I won't accept any date on the foreign documents. I think the witness should testify as to how long he has had them in his possession.

Mr. Litzenberg: We are just putting them in in answer [134] to his statement, and for the further reason that all of these circulars disclose the same spray gun shown in the French patent that is introduced in evidence.

Mr. Blount: That is your opinion.

(Testimony of Charles Boyden.)

Mr. Huebner: I still say that it is not competent unless it is shown to be part of the prior art.

Mr. Litzenberg: We are introducing it as disclosing a part of the prior art. We have no definite proof other than just the document itself, and the fact that those documents were received by Mr. Boyden from the New York agent.

The Court: When was that? A. In 1933.

Q. By Mr. Litzenberg: Will you explain, if you can, how he happened to send these to you?

Mr. Huebner: That is objected to as irrelevant and immaterial.

Mr. Litzenberg: No, I think not.

The Court: Well, he may answer that.

Mr. Huebner: And moreover these are printed in some foreign language, or some of them are. I object to them as incompetent, unless they are translated or the witness testifies that he can read the language in which they are printed.

The Court: That is correct. Counsel should supply translations.

Mr. Litzenberg: Well, I think a translation will not be [135] necessary. I am willing that the objection shall be entered.

The Court: Sustained, then.

Mr. Litzenberg: An exception.

The Court: Yes.

Q. By Mr. Litzenberg: Just briefly explain how Mr. Gossner happened to send these to you?

(Testimony of Charles Boyden.)

Mr. Huebner: I thought my objection went to any testimony in regard to these, your Honor.

The Court: Yes. If they are not coming in, it is immaterial how he happened to send them.

Mr. Litzenberg: I would like to offer in evidence, however, this one circular, entitled "El Salvador," printed in Spanish, simply for the disclosure that is made in the drawings, bearing date Febrero, 1933.

Mr. Huebner: That is objected to as incompetent, on the ground that the document must be considered as a whole, and unless there is a translation it can not be properly introduced.

The Court: I am inclined to sustain that objection. We will have to find out what the man is getting at.

Mr. Litzenberg: The reason I am offering this, if the court please, is that the drawing is the same drawing in all of the several circulars that is shown in the French patent which has been introduced in evidence with the translation. [136]

Mr. Huebner: Well, that patent shows for itself, then.

Mr. Litzenberg: Yes, that is true. But it was such good corroboration that we felt that it would be helpful to the court in establishing the definiteness and certainty of the French patent and the construction shown in the drawing. We may wish to ask later for the privilege of introducing it, with a translation.

(Testimony of Charles Boyden.)

The Court: You have a right to renew the offer.

Mr. Litzenberg: I think you may take the witness

Cross Examination

Q. By Mr. Huebner: Is this the so-called French gun which you referred to on your direct examination? A. It is.

Mr. Huebner: It doesn't have any exhibit number.

Mr. Litzenberg: If you would like, Mr. Huebner, we would be very glad to introduce that and have it marked.

Mr. Huebner: It doesn't make any difference to me. I will interrogate the witness.

Mr. Litzenberg: It is our plan to introduce it. Perhaps I should have done that.

Q. By Mr. Huebner: Which French patent did you say this physical gun embodies, according to your interpretation?

A. The Societe Nouvelle patent, or it is a patent, I think, assigned to the Societe Nouvelle. [137]

Mr. Huebner: Where is that?

Mr. Litzenberg: They are in the French Consulate. They haven't been returned yet.

Mr. Huebner: That is one of the patents for which there was no translation?

Mr. Litzenberg: Yes, and we withdrew it with the consent of the court and left a receipt for it. It should be here.

(Testimony of Charles Boyden.)

Mr. Huebner: It is a little difficult, your Honor, without the translation, to——

The Court: You can pass it for the time being.

Mr. Huebner: I will pass that.

Q. By Mr. Huebner: Mr. Boyden, on your examination previously you stated upon various occasions, once at page 59 of the record, and again at page 72, and there may have been some others—I don't recall—that one of your reasons for making the combustion head as an integral unit distinguishable from and separable from the power unit, although they were mounted in combination for operation, was that you wanted to get away from an aluminum gas head, and you say, "I wanted a bronze seat on my valve." Do you recall that that was your testimony? A. That is the reason.

Q. Isn't it a fact that you have, since the manufacture of the first Mogul gun, which is in evidence as Exhibit 8, manufactured other Mogul guns in which the [138] combustion unit was made of aluminum? A. That is so.

Q. And those guns in which the combustion unit is made of aluminum are identical in construction with the physical Mogul gun, Exhibit 8; is that right?

A. No, they are not of identical construction. The leads, the hose leads come off the bottom.

Q. You mean the leads for the gas——

A. Those were to lighten up the gun. They are not as satisfactory as that.

(Testimony of Charles Boyden.)

Q. Well, don't anticipate, please, and it will save time if you will just keep it in order. The leads for the acetylene and oxygen and the air, you say, are introduced from below?

A. That is right.

Q. Instead of from the side? A. Yes.

Q. The rest of the head is identical with the head on this gun, isn't it? A. No, it is not.

Q. In what respects is it not?

A. The valve is around on the bottom. The rest of the head is very much the same as your little Metallizer or the French gun. The hose comes down at the bottom, and the valve is just above the hoses.

Q. But isn't it true that the combustion head is [139] mounted beneath the shoulder or abutment of the forward end of the member? A. Yes.

Q. And is detachable from the member?

A. It is.

Q. In the same way that the Mogul gun, Exhibit 8, has a detachable combustion unit?

A. That is right.

Q. How many guns of the character last described, that is to say, the Mogul guns, with the aluminum combustion head, have you made and sold?

Mr. Litzenberg: We object to that as immaterial and not having any bearing on the question of infringement.

The Court: Well, have you sold many?

A. Not many. Maybe 25 or 35.

(Testimony of Charles Boyden.)

Q. By Mr. Huebner: Is there any difference between those Mogul guns with the aluminum combustion unit and the Mogul guns with the bronze combustion unit, other than you have mentioned?

A. You mean in the way they operate, or anything?

Q. Yes. A. No. They all operate the same.

Q. They all operate in the same way?

A. In the same way. The performance is the same.

Q. And the construction of both of the Mogul guns, with the aluminum head and with the bronze head, is [140] substantially identical?

A. It is.

Q. I notice that in your direct testimony you discussed the French patent 680,554, for which we are waiting for the translation, and also the Valentine U. S. patent, and you did not discuss in your examination any other prior patents in evidence. Is there any patent among those which your counsel has offered which you consider to be closer to the disclosure of the patent in suit than this French patent and the Valentine U. S. patent?

A. I don't think I understand just what you mean.

Mr. Huebner: Will you read it, and then if you don't understand it, I will explain it.

(Question read by the reporter.)

A. You mean that discloses prior art?

(Testimony of Charles Boyden.)

Q. By Mr. Huebner: Yes. Is there any patent other than these two which you think is closer to the Lensch and Leder patent in suit?

A. Well, I would say each one has some particular thing that is not mentioned in the Lensch and Leder patent.

Q. Well, let us confine ourselves to this particular question and answer. Is there any one patent among those offered in evidence by defendants' counsel which alone is closer to the disclosure of the patent in suit than these two that you have mentioned?

A. Well, I think the French patent is the closest.

[141]

Q. You mean French patent——

A. That gun over there.

Q. 680,554?

A. Well, I can't identify it. I don't know it. I can't identify the patent number.

Q. The patent which you say is exemplified by this French gun here?

A. That is the one. Well, that is all right. I took some screws out of it.

Q. You have the screws, have you?

A. In my pocket.

Q. Then that French patent, in your opinion, shows more of the features of the Lensch and Leder patent than any other patent in the prior art; is that correct?

A. I would think so, yes.

(Testimony of Charles Boyden.)

Q. Have you read and are you thoroughly familiar with this French patent?

A. I have never read the patent itself. I mean I can't read French. But I can tell from the drawings just what features are, well, desirable, if you want to call it that.

Q. Have you ever seen and read a translation of this French patent? A. I have not.

Q. Then in your testimony you were relying wholly upon what appeared on the face of the drawing, without reference to the descriptive matter in the specifications? [142] A. That is true.

Q. Here is one French patent with a translation, Defendants' Exhibit B, and it is No. 741,740. You have, I presume, read the translation of this patent? A. I glanced through it, yes.

Q. Did you look at it carefully enough to know its contents?

A. Well, the thing that I was interested in in the drawing is not mentioned in the patent, and that is the exposed feed rolls, visible feed.

Q. The exposed feed roll feature is not mentioned in the patent? A. No.

Q. You looked for that? A. Yes.

Q. And found no reference in the translation of the specifications to that feature?

A. No reference. It shows in the drawing.

Q. There were two French patents, for which there were no translations, and we discussed one

(Testimony of Charles Boyden.)

which you say you didn't read, because you don't read French. Do you know the other one?

A. I don't recall what it was.

Q. Is it French patent 639,039?

A. I wouldn't know.

Q. Have you read that specification? [143]

A. It is in French.

Q. Then you haven't read it? A. No.

Q. Directing your attention to the drawing of this French patent No. 680,554, will you explain to the court what Figure 4 illustrates and how that element fits into the gun?

A. Figure 4 has only to deal with the combustion chamber.

Q. Well, what is it?

A. Well, it is a siphon arrangement. It is attached to the oxygen tank and supplies oxygen and, also, there is hooked to it a hose.

Mr. Huebner: Does your Honor have a copy of that drawing? I think not because I provided the witness with the one we had.

A. It has nothing to do at all with anything involved in the patent. It is a separate unit that is away off here somewhere.

Q. I would like to have you explain to the court what it is, what functions it performs and where it fits into the disclosure of the patent.

A. It is the mixing chamber where the gases are mixed between the tanks, the acetylene and oxygen tanks, and the gun. In other words, there is a hose

(Testimony of Charles Boyden.)

attached here and this is a fitting here that screws on the oxygen tank. [144] I have seen one of these. And then the gases go on out and they go to the gun.

Q. Does this element in Figure 4 fit somewhere in the gun? A. No.

Q. Where does it go? A. On the tanks.

Q. What is this element 33?

A. It is an attachment to the tank.

Q. This element 33 you say is an attachment to the tank?

A. I would think so; yes. I haven't read the description of the patent.

Q. You say you can read the drawings and I want to inquire about that.

A. Well, I can. That is the mixing chamber.

Q. So this collar 34 in Figure 4 screws onto the oxygen tank?

A. I think it does unless this is slightly different than the one that we have. We have one that is similar to this.

Q. And the element 33 you take it to be merely the line between these parts?

A. It may be a diaphragm of some kind that goes in there. I can't tell. Anyway, here is what I am getting at. This member is loose from this member. Obviously, this is a mixing chamber. It is of the siphon type. [145]

Q. Turn it so the court can see it.

A. It is of the injector type, you might call it.

(Testimony of Charles Boyden.)

Q. You say the mixing of the gases occurs before the gas and acetylene get up to the gun?

A. In this drawing here it does not, evidently.

Q. Well, now, do you mean that there are two embodiments of the invention in this French patent?

A. This is a mixing chamber of some kind.

Q. Which are you referring to? A. This.

Q. Figure 4? A. Figure 4.

Q. Is there a mixing chamber in the gun itself?

A. There is a mixing chamber in the gun. Have you the original so I can see it more clearly?

Q. Your counsel has the original from the French consulate. This is the best copy that I have.

A. As a rule, there are some plates in there where the mixing takes place. I don't think this is the same drawing as the other one.

Q. You mean that there is something erroneous in this drawing?

A. No. I think this is a different patent than the one that we have.

Q. Well, let's check on that. It appears to be patent No. 680,554. [146]

A. Well, I don't know.

Q. Now, do you think you were in your other testimony referring to some other patent?

A. What was the patent we introduced?

Q. This is it. Well, you introduced several of them but this is one of them that you referred to on your direct examination.

(Testimony of Charles Boyden.)

A. Well, the only thing that we are discussing is the enclosed housing and so forth on this patent.

Q. But that is not all I am discussing. I want to know how much of the rest of that disclosure you understand and I think it is important that you reveal to the court just how much of that drawing you do clearly understand.

A. I don't clearly understand this here or this here.

Q. What are you talking about now?

A. This part here.

Q. Figure 4? A. Figure 4. And this here.

Q. In Figure 6?

A. Yes. This looks as though it might be some sort of a backfire preventer.

Q. But you are not positive of that?

A. I am not positive.

Q. Are there any other figures in there that you don't understand?

A. It doesn't show in the drawing whether there are three [147] valves here or two. You see in that gun there there are three valves.

Q. What gun? A. The French gun.

Q. The physical specimen?

A. The physical specimen. There are three valves down here. In this gun there is no front view to show whether there is one valve or two valves or three valves except this. [148]

Q. And you are now pointing to Figure 5?

(Testimony of Charles Boyden.)

A. Figure 5. If I may have that gun, I can explain it to you. The valves I refer to, these valves here, are evidently these members here. In this gun there are three, yet they only illustrate two there and there is no front view of the gun to show whether there are three or not.

Q. If there were only two, as shown in Figure 5, what would those two be for?

A. One could be for air and one could be for gases. I mean the mixed gases. It could be.

Q. But you are not positive whether it is or not?

A. No; I am not positive. In this gun here there is no question but what one is for acetylene or hydrogen and oxygen and air.

Q. You are talking about this physical specimen?

A. This physical specimen. There is no question about that. But here it could be air and mixed gases.

Q. And you are referring now to Figure 5 of the French patent?

A. Yes. And, if it is mixed gases, then this would be no doubt a mixing chamber.

Q. Referring to Figure 4? A. Figure 4.

Q. But you are not positive as to that arrangement or relationship? A. No. [149]

Mr. Huebner: In view of that, your Honor, I move to exclude all of the testimony referring to the physical specimen of the so-called French gun

(Testimony of Charles Boyden.)

on the ground that the witness is not shown to clearly understand the French patent. The gun itself is not prior art and has not been established as prior art, and the French patent must be relied upon for what it shows on its face and, under our well-known rules, must be strictly construed as to disclosure.

A. But that picture shows clearly——

Mr. Huebner: Just a minute until the court considers that.

Mr. Litzenberg: We want to oppose that objection on the ground that counsel has interrogated the witness in regard to an immaterial part of the invention involved in this case, the claims being wholly drawn to the structure which is shown in section and which the witness is able to describe in detail and explain the reason for the construction and for the arrangement. The question of the gases and the conveyance of the gases to the machine is not involved in the patent in any manner and is not included in the claims.

Mr. Huebner: It is part of the combustion unit.

Mr. Litzenberg: It is only in a general statement.

A. This is not used in the plaintiffs' gun nor is it used in our gun.

The Court: I will deny the motion and an exception may show and I will hear argument later.

(Testimony of Charles Boyden.)

Q. By Mr. Huebner: Does that French patent drawing illustrate any hole in the top of the gun?

A. Well, there is no drawing of it except it shows the gun completely open here.

Q. Is there any disclosure anywhere in the drawing of the French patent of a hole for any purpose in the top of the gun?

A. Do you mean in the picture or drawing here?

Q. In the drawing of the patent.

A. The top is wide open.

Q. Then, is there a disclosure of a cover with a hole in it? A. No.

Q. There is in this physical specimen some kind of a hole in the top in the gun, isn't there?

A. There is. That is where the latch goes.

Q. And that is free to allow venting, isn't it?

A. It is.

Q. Is there any means disclosed in that French drawing for adjusting the pressure of the feed wheels, the wire wheels? A. There is none.

Q. There is nothing shown at all? A. No.

Q. Is there in the physical specimen which you have referred to for illustrative purposes? [151]

A. Do you mean this gun here?

Q. Yes. A. No.

Q. There is nothing there, either? A. No.

Mr. Litzenberg: What was that question, please?
(Record read by reporter.)

(Testimony of Charles Boyden.)

Mr. Litzenberg: Is that all of the question? What is the question preceding it?

(Record read by reporter.)

Q. By Mr. Huebner: Isn't the feature of adjustability an important feature in a gun with utility?

A. Why, it is helpful. We have it in our old little gun.

Q. Without any feature of adjustability, you can only use one size of wire, can't you?

A. Well, it is a matter of spring pressure, I think, that you are referring to now.

Q. That is part of it.

A. You can adjust or in our gun you adjust——

Q. I am talking about the feature of adjustability which is lacking in the French patent.

A. Oh, in this, yes. That accommodates different sized wires; I mean to take up for the difference in the diameter of the wire.

Q. Which the French gun will not do? [152]

A. Oh, no. It will do it. They use different sized wires in the French gun.

Q. But, when you have different sized wires in and no adjustability, you are going to have an uneven feed, aren't you? A. No.

Q. Do you mean you can use different sized wires in a gun in which there is a fixed spacing between the lower feed wheel and the upper feed wheel?

(Testimony of Charles Boyden.)

A. I don't say it can. I say they do. I will bring up another gun here and show you that they do it.

The Court: He means to ask how does the machine operate to adjust its feeding pressure to different sized wire.

A. Your Honor, the difference in the size of the wires is very little. In this gun I think they use about what would be equivalent in our size to about forty-thousandths diameter and possibly sixty or seventy-thousandths diameter, meaning a difference of a thirty-second of an inch, and there is plenty of give here in this spring to accommodate that difference.

Mr. Litzenberg: May I interject here that, while it is not adjustable, counsel has not brought out that it is yieldingly mounted?

Q. By Mr. Huebner: This French disclosure No. 680,554 is quite similar to your Metallizer gun; isn't it? A. It is. [153]

Q. It has, in Figure 1, a plurality of gas and oxygen passages in the forward wall of the box, hasn't it? A. That is right.

Q. And in that respect it is similar to your Metallizer? A. Very similar.

Q. And in that respect it is wholly dissimilar to your Mogul? A. It is.

Q. This French patent discloses a boxlike casing, doesn't it? A. It does.

Q. And there is a cover on the casing, isn't there? A. An outside cover here?

(Testimony of Charles Boyden.)

Q. Yes. A. Yes.

Q. It is covered all around, top, bottom, sides and ends? A. It is.

Q. And the cover must be closed in order for the gun to operate, mustn't it? A. It must.

Q. And in those respects which I have last detailed the French gun is similar to the Metallizer, isn't it? A. It is.

Q. And in those respects it is dissimilar to the Mogul, [154] is that correct? A. No.

Q. Do you want to explain your answer?

A. Those are collective questions there. Ask them individually and I can explain that. It is similar to the Mogul in that we have a housing here. It is similar to the Mogul in that there is a housing here enclosing the gears. That is similar to the Metallizer in that we have to close the cover and similar to the Metallizer if you would remove the housing.

Q. You mean if you remove the housing of what? A. This housing here.

Q. If you remove the housing of the French gun, then it is similar to the Metallizer?

A. Then it is similar to the Metallizer; yes.

Q. Does the French gun have an open channel in the sense that the channel of the patent in suit is open? A. No.

Q. Does it have an open channel in the sense that the Mogul gun has an open channel?

A. No.

(Testimony of Charles Boyden.)

Q. Does it have a combustion unit which is a separate unit from the power unit and is detachably mounted on the forward portion of the power unit?

A. Well, as a matter of fact it does. The front wall of the gun here carries the gas passages. The mixing takes [155] place in these little plates here, although they don't show here.

Q. You mean they don't show in the patent drawing?

A. They don't show in the patent drawing but, as a matter of fact, this is slightly different in this gun in that the mixing takes place here in this gun and the mixing takes place here in this gun, and from here over——

Q. Just a minute. You are saying "this" and "this" and I would like you, please, to refer to the patent or to the physical specimen so that it will be clear later what you have said.

A. I will say this, that the mechanical portion of the gun is identical with this.

Q. You say the mechanical portion of the French patent is identical with the mechanical portion of the specimen?

A. Yes, sir; of this one here.

Q. What do you mean by the mechanical portion?

A. This is the gas portion of the gun, the combustion portion, the drive taking the—or everything enclosed from here back is identical with this.

(Testimony of Charles Boyden.)

Q. Let's get back to the question. Is there in the French patent a detachable combustion unit in the sense that there is a detachable combustion unit in the Lenseh and Leder patent?

A. Do you mean where the gases enter the gun, until [156] they come out of the front end of the gun?

Q. Yes. A. It is not; no.

Q. It is not found in the French patent, is it?

A. No. But, taking it literally, the combustion takes place in this gun here from here forward. In the mixing of the gases without that there is no combustion.

Mr. Huebner: I move, your Honor, to strike the last part of the answer as not responsive.

The Court: I will allow it to remain as explanatory.

Q. By Mr. Huebner: It is a fact, is it not, that in the French patent all passages for air, oxygen and gas, are in the forward wall of the housing?

A. In this patent here?

Q. I am talking about this French patent.

A. No. There are two channels, evidently. I imagine those holes there are the channels. The air comes up here and the mixed gases come up here.

Q. But don't they all pass through this thickened forward wall of the casing? A. Yes.

Q. So there are passages for gas and for air and for oxygen in the forward wall of the casing, isn't that right?

(Testimony of Charles Boyden.)

A. Well, it is according to how you want to interpret that. The gas and the oxygen or the acetylene and the oxygen, or whatever gas you use, are mixed and pass up as a [157] mixed gas. They are not separate gas passages for those two gases.

Q. Awhile ago you said that you were not sure whether there were two passages or three passages.

A. I can't see the front of the drawing so I wouldn't know whether this is illustrative of just two members or three.

Q. Whether there are two or three, they do go up through the forward thickened wall of the casing, don't they?

A. They do; surely.

Q. And that forward thickened wall of the casing is in no sense detachable from the power unit of the gun, is it?

A. It is not detachable.

Q. In that respect the French patent gun is subject to the same disadvantages as the Metalizer, isn't it?

A. Well, if they are to be considered disadvantages.

Q. In that French patent you can't see the wire under any conditions during the operation of the gun, can you?

A. Not in a normal position; no. You might be able to peek down through the hole and see it but I doubt it.

Q. Through what hole?

A. Through this aperture here.

(Testimony of Charles Boyden.)

Q. I am talking about the French patent.

A. It doesn't show anything.

Q. It doesn't show in the French patent? [158]

A. There is no lid on the gun so you can't see it.

Q. So far as the disclosure of the French patent goes there is absolutely no way to inspect the wire during the operation of the gun, is there?

A. There is no way to tell whether you can inspect it because there is nothing shows.

Mr. Litzenberg: We would like at this time, if your Honor please, to offer an objection to the faint print which is being used for the purpose of examining this witness.

Mr. Huebner: Well, you produce a better one, Mr. Litzenberg.

Mr. Litzenberg: We will as soon as it is returned from counsel's office.

Mr. Huebner: Here is a negative. If the witness can read that, he is welcome to it.

A. But the point is this, the lid doesn't show on a plan view so you can see whether there is a hole in it or not.

Q. That is all right. I won't debate that with you. I want you to testify as to what is or is not shown in that French patent, not what might be or could be. A. Well, that is not shown.

Q. Figure 1 illustrates the gun with the lid installed and closed, doesn't it?

A. It is a side view. [159]

(Testimony of Charles Boyden.)

Q. Can't you answer the question yes or no?

A. Yes; it does.

Q. Maybe you could do better with this negative. I am happy to have you use it if it will help.

A. Oh, yes; this is much better.

Q. In Figure 1, where the lid is shown or the cover is shown in place and closed, there is no indication of any kind that there is a port or hole in the top of that cover, is there?

A. There is no indication.

Q. So that as far as the disclosure of the patent is concerned there is absolutely no way to inspect the wire during the feeding operation, is that right?

A. From the picture there is no way of telling whether you can inspect it or not.

Q. Can't you answer the question?

A. Put the question again, will you?

The Court: You mean that there may be such but the diagram does not illustrate it, is that it?

A. That is what I mean; yes. I think that is a fair answer.

Q. By Mr. Huebner: If you raised the lid or cover of the French patent to inspect the wire, the feeding operation would stop, wouldn't it?

A. It would.

Q. Would you be able in this French patent to insert [160] the wire after lighting the flame or would that be a dangerous operation?

A. Well, I couldn't say as to that. I never operated the gun and never saw one operate. [161]

(Testimony of Charles Boyden.)

Q. Well, to the best of your judgment as an engineer who says he knows this art, what do you think?

A. I think it would be better to have the wire in the wire nozzle.

Q. If you didn't put the wire in the nozzle before you lighted it, what might happen?

A. The gas might get back in the case. There is a possibility it might.

Q. And, if the gas got back in the case, it might explode?

A. It might explode.

Q. The same as the Metallizer?

A. Oh, yes; sure.

Q. Is there some sort of a safety device disclosed in this French patent to take care of any explosion or backfire?

A. Well, in that reference I made a while ago to this member here, No. 6, I said it looked to me like a safety device.

Q. That is the only safety device that you see illustrated in the drawing?

A. That is the only thing I see there; yes.

Q. I would like you to look carefully because it might prove to be an important point.

A. As I said a while ago, this might be some sort of a diaphragm here. I said, first, it was attached on the [162] tank but I said later it might be some sort of a diaphragm arrangement. That would be No. 33.

(Testimony of Charles Boyden.)

Q. Is it necessary in your Mogul gun to provide any safety arrangement such as has been illustrated according to your testimony? A. No.

Q. And it is not necessary in the patent gun to provide any safety arrangement, is it? I am talking about the Lensch and Leder patent.

A. No; it is not.

Q. And that is because in the Lensch and Leder patent in suit and in the Mogul gun any backfire will not injure any of the working parts, is that right? A. Yes: that is true.

Q. And that, if there should be a gas leakage, it will not accumulate in a pocket and cause any explosion, is that right?

A. That is true. But this has nothing to do with that from my understanding of it.

Q. What is that?

A. This arrangement here has nothing to do with what you are talking about.

Q. What is your understanding of it?

A. This French gun and also the Schoop gun which Schoop made in Switzerland mix the gases at the tanks. And it runs the hose around the floor. It is combustible [163] gases or I mean gases ready to burn and at the end of the wire nozzle. And I have seen those explode and tear the whole hose up. So evidently that is what that is for, so that it wouldn't have any effect of backfire there.

Q. Aren't these safety features that we have just been discussing with respect to the Mogul gun

(Testimony of Charles Boyden.)

and the Lensch and Leder patent gun partly due to the fact that the wire feed wheels operate in an open channel?

A. No. It has nothing to do with this safety feature here.

Q. I am not talking about the safety feature there. What I am talking about is the fact that the Mogul gun and the patent in suit will not cause any injury to a person and no serious injury to the operating parts if there is a backfire and that no gas can accumulate in a pocket. Taking those two features, that is true, is it not, because the wire feeding wheels in both the Mogul and in the Lensch and Leder patent in suit operate in an open channel?

A. No. The fact that they operate in an open channel has nothing to do with it. The old goose-neck gun is that way.

Q. By the Court: Do you mean with an open channel the gas dissipates itself, whereas, if it is closed, it becomes condensed?

A. No, your Honor. May I have that goose-neck gun, please? Will you permit me to illustrate what I mean? [164]

The Court: Yes.

Q. By Mr. Huebner: Is this what you mean?

A. That is the one. This gun has no open channel, yet it has that feature. Do you see what I mean? In the other gun there is a channel in here. Well, you saw the other gun. But in this gun

(Testimony of Charles Boyden.)

the feed is off to the side and there is no open channel. So that doesn't have anything to do with it. The fact that there is no open channel has no bearing on it.

Mr. Huebner: I should like to have this gun marked for identification which the witness just had in his hands and said had no open channel.

The Clerk: Plaintiffs' Exhibit No. 14 for identification.

Q. By Mr. Huebner: In a previous answer you pointed out that in the French patent there is no tension-adjusting mechanism for the feed wheels.

A. That is true.

Q. And it was your testimony also, I believe, that that is not necessary; that a tensioning device is not necessary.

A. Not with the limited diameter or range of wire.

Q. Then, why do you put a tensioning device in the Mogul gun?

A. It is what you might call a fixed tensioning device. You screw it down until it just makes tension and after that it is purely flexible. May I explain there that we [165] accommodate all the way from 11-gauge wire to $\frac{1}{8}$ -inch wire, which is about 91 1000 to 125 1000, with any difference in adjustment? If you study our gun, you can see that.

Q. In the same gun?

A. Yes.

(Testimony of Charles Boyden.)

Q. But, without that spring-tensioning feature, you wouldn't be able to do that, would you?

A. This has the spring.

Q. Which has the spring?

A. This gun here.

Q. The French gun?

A. There is the spring.

Q. Wait a minute. Look at the patent and not that physical gun there. Where is there any spring shown in the French patent?

A. That is right; there is none. Well, wait a minute. It is not illustrated in here but I am not so sure it is not illustrated in here.

Q. If you can find it anywhere in the French patent, point it out to the court.

A. Well, that isn't new. That is old anyway.

Mr. Litzenberg: Describe the Figure and the number. Just give the number.

A. It doesn't even show a number on it.

Mr. Litzenberg: Give the Figure.

A. Figure 1. [166]

Q. By Mr. Huebner: You say there is a spring illustrated in Figure 1?

A. You can't see the spring because it is covered up but there is a sort of a boss there that would indicate there was some member in there.

Q. You don't know, do you, whether there is or is not a spring? A. I don't.

Q. By the Court: Is there any advantage in varying that spring pressure?

(Testimony of Charles Boyden.)

A. Well, I don't know. It used to be considered such but we don't make any provision for it in our Mogul. We use a heavier spring of better construction and it has got more latitude.

Q. Mr. Boyden, in this series of questions where you and I referred to this French patent, did you mean that we were talking about patent 680,554?

A. Which one is this? Is this the same one we introduced?

Q. That is one of those you introduced. I just want to clear the record, that when we talk back and forth about this French patent we are talking about French patent No. 680,554?

A. That is the one I am referring to now, yes.

Q. And that is the one you have been looking at? A. Yes. [167]

Q. Isn't it also true that a spring adjustable tension device is important, because of the use of different types of metal wire in spraying?

A. We have never found it so.

Q. You don't feel that you need a heavier tension with steel than you do with lead?

A. You get a heavy enough tension as it is.

Q. Well, I want you to answer that question. Isn't it advisable to use a heavier tension with steel wire than it is with when you are feeding lead wire?

A. It might be advisable to, but we have made no provision for it. We don't have any trouble.

Q. What do you mean, you don't have any trouble?

(Testimony of Charles Boyden.)

A. Well, we don't have wire slippage. It is the same answer.

Mr. Litzenberg: If the court please, I may state that we have received these two French patents. They have been returned with the report that the man who was to translate them, for some reason they have a sickness, and then they sent it over to the consul, and the consul is observing a holiday today, and they were unable to give us the translation. Whether or not it is worth going to the trouble of calling an interpreter to take the witness stand and interpret these drawings—we should be very happy, and we don't see any reason why it should not be agreed to by counsel, to permit the presentation of the translations [168] later, to be attached to the French patents which have been presented for identification.

Mr. Huebner: It seems to me that is trying the case piecemeal, that we ought to have before us during the trial what we are talking about.

Mr. Blount: They knew they were going to use these French patents, in advance, and they made no preparation to have translations here.

The Court: Could an interpreter be called to read them into the record?

Mr. Litzenberg: I assume such an interpreter could be had. We did not expect that counsel were going to rely upon technicalities in patent cases where the drawings are just as clear to a man who reads drawings as is the French or the Spanish

(Testimony of Charles Boyden.)

language. The fact of the matter is the drawings are just as clear as can possibly be, and all we want to do is to get all the truth before the court.

Mr. Huebner: Well, his own witness says that there are some features of the drawing that he can't make out. I never heard of counsel offering foreign patents without translations, and it is assumed that whoever is going to offer foreign patents will produce translations of them.

Mr. Litzenberg: I confess to neglect in getting the translations. I don't believe this case is going to be decided upon any strict technicality.

Mr. Blount: It is not a technicality. [169]

Mr. Litzenberg: Yes, it is.

The Court: You can either call your interpreter or agree upon translation being made and filed. I suppose it can be done before the case is completed.

Mr. Litzenberg: May I ask if the court has a regular interpreter?

The Court: Not that I know of, not Spanish.

Mr. Litzenberg: Will counsel agree to allow the interpretation, the translation to be introduced later

Mr. Blount: It hampers the plaintiff on cross examination, having a patent brought in here without having the patent claims set forth in English. The claims of the patent are just as important to explain the diagrams as the diagrams are themselves.

(Testimony of Charles Boyden.)

Mr. Litzenberg: That is where counsel is mistaken. The claims of foreign patents have nothing whatever to do with the suit. It is only the description, and the description is no clearer to a mechanic than the drawings themselves are. [170]

Mr. Huebner: In many cases, Mr. Litzenberg, the courts refer to the claims of foreign patents to get a clear picture of the disclosure. And of course, Mr. Blount is talking about the disclosure.

The Witness: Do you have translations?

Mr. Litzenberg: I understood counsel had translations of these same patents, if they want to use them.

Mr. Blount: We have our own translations. We are not certain that they are correct in detail.

Mr. Huebner: We only had our translations made informally, to check against the translations which we presumed would be produced by the defendants' attorney.

Mr. Litzenberg: We are willing to accept counsel's translations without any question.

The Court: Of course, if you are not certain that your translations are correct, I don't know how you could cross examine the witness with the idea of impeaching him.

Mr. Blount: We didn't make them with the expectation of using them here, but only as an aid in examination.

The Court: Yes, but you can't contradict him under those statements, can you, when you are not sure of your own translations?

(Testimony of Charles Boyden.)

Mr. Litzenberg: If your Honor please, when you get right down to the matters involved in this case, all of this discussion is absolutely immaterial and does not go to the question of the infringing construction compared with [171] the alleged claims.

Mr. Huebner: Do you mean that you want to withdraw these patents?

Mr. Litzenberg: No, I do not. I am simply presenting these foreign patents to show the state of the art, to show that this question of gun operating mechanism has been gradually developed until all invention involved has been taken up, and what Boyden has done and what Lensch has done is nothing more than mechanical skill. There is only one element involved differentiating the Lensch patent from the prior art, and that is called for in the claims, and that is the open channel and the reason for the open channel, and that can all be taken care of in argument, from what has already been presented to the court. I am satisfied the court understands the mechanism, without any of the mechanical disclosures which have been referred to.

Mr. Huebner: After conferring with my associates, it is agreeable to cooperate with counsel and aid the court, and our translations may be used as counsel wishes. The translations were made by Mr. Stokes, our expert witness, who reads French, and we offer the use of these at this time, if you desire.

Mr. Litzenberg: We appreciate that courtesy, Mr. Huebner.

(Testimony of Charles Boyden.)

The Court: They may be filed.

Mr. Blount: Mr. Stokes is a French scholar, and he has [172] made the translation.

Mr. Litzenberg: We will raise no technicality on that, and we will consider that this interpretation will be used in connection with the French patents that have been introduced.

The Court: The patents and the interpretations will be filed together.

Mr. Huebner: I think that as long as we have given Mr. Litzenberg two of the translations, we should also put in our own translation of the other patent, No. 741,740. Any objection to that?

Mr. Litzenberg: None.

The Clerk: As part of the same exhibit?

Mr. Huebner: As part of the patent, yes.

Q. By Mr. Huebner: Now will you turn, Mr. Boyden, to the Valentine patent, the U. S. patent?

A. I have it here.

Q. Is there any air turbine or other power device disclosed there?

A. There is none. It evidently is an outside drive of some kind.

Q. How is the outside drive communicated to the working parts of the Valentine gun?

A. Through a worm and gear.

Q. But what brings it in?

A. A flexible shaft, I suppose. [173]

Mr. Litzenberg: Can you refer to the reference numeral there?

(Testimony of Charles Boyden.)

A. I haven't read the patent. There is some kind of a member comes in there to make it operate, if it has to.

Q. By Mr. Huebner: There is no turbine housing in that Valentine patent, is there?

A. There is not.

Q. Is there any latch in that Valentine patent which is pivotally fastened to the gear case, which carries an adjustable tension, so that when the latch is swung the wire feed is feeding?

A. It shows no pivot at all, I mean, so that you can swing the case up. It shows a latch on one side, but there is nothing shown in the nature of a pivot. But it shows these screws are adjustable. And here is a spring here, and working the plunger exerts pressure on the shaft, the idler, and above that is a screw member, so that the pressure on the spring can be varied.

Q. That latch is not pivotally secured there so that it can be swung into or out of position, is it?

A. It doesn't show any kind of a hinge.

Q. The Valentine gear case is tightly closed, is it not?

A. It is.

Q. And any chips or dust from the wire will foul the wire feeding wheels in Valentine; isn't that true? [174]

A. They will.

Q. Can you select from all of the prior art which your counsel has offered any patent having a latch pivotally mounted in a channel which is open to the atmosphere, in a metal spray gun, which latch

(Testimony of Charles Boyden.)

device and wire feed wheel is adapted to rotate in the open channel, and which carries a tension device thereon adjustable during operation, whether the wire is visible or not?

A. May I read that myself?

Q. Well, I don't mind your seeing my notes, but my notes are not quite complete. I think it would be better for the reporter to read the question slowly.

The Witness: I can grasp it better if I read it myself.

The Court: Read it slowly.

Mr. Litzenberg: I think the question anticipates or contemplates furnishing the witness the various patents which have been presented, in order that he may——

Mr. Huebner: Naturally I will hand them to him.

The Witness: Yes, the patent itself. May I read the last Leder patent, the one that is under consideration?

Mr. Litzenberg: Now listen to the question as it is read, and then you will understand why these patents have been presented to you.

(Question read by the reporter.)

A. I don't think so, that exact description, under that description, nothing that I see here. [175]

Q. By Mr. Huebner: And you have looked over all of those that are in evidence? A. Yes.

Q. Is there any point made in the patent in suit, that is, the Lensch and Leder patent in suit, either

(Testimony of Charles Boyden.)

in the specification or the claims, that the wire shall be visible during feeding?

A. You mean do I know of any——

Q. Do you know of any particular place—are you able to designate any particular passage in the patent in suit where it is stressed that the wire shall be visible during feeding?

A. No. 2, claim No. 2, the last end of claim No. 2,—“whereby said wire feeding wheels are visibly disposed in said channel.”

Q. Is that the only reference that you find in the patent to the feature which I mentioned?

A. No. 3—“means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire.” Well, no, that don’t mention it. I thought it did.

Mr. Litzenberg: It seems to me, if your Honor please, that the patent and the language therein contained speaks for itself.

The Court: I think so.

Mr. Litzenberg: And it is a waste of time to take counsel’s—— [176]

The Court: Yes. You can argue it.

Mr. Huebner: Let me just ask this question, then:

Q. In the patent in suit the full vision of the wire occurs only before the latch member is dropped; isn’t that true?

Mr. Litzenberg: We object to that. It speaks for itself. It is very clear in the drawings and the en-

(Testimony of Charles Boyden.)

larged charts presented. The witness' testimony wouldn't change it.

A. I think it does, yes.

Q. By Mr. Huebner: The answer is yes?

A. Yes.

Q. And the same thing is true, is it not, in the Mogul gun? A. Yes.

The Court: To the same extent?

A. Well, virtually, yes.

The Court: It is visible to the same extent?

A. He means before the gun is put in operation the latch is thrown back. That is what you refer to, isn't it?

The Court: Yes.

A. It is about the same.

The Court: Can you see as much of the wire in that position also in each case?

A. Yes.

The Court: And when they are closed, can you see it [177] the same?

A. No. In the Mogul you can hardly see it at all, unless you move the gun around in a certain position so you can see it.

The Court: That might be misinterpreted, unless we have the object before us.

Q. By Mr. Huebner: I believe you testified on direct examination, Mr. Boyden, that you knew of the Lensch and Leder patented gun before you designed the Mogul, and that you had seen circulars of the gun? A. That is true.

(Testimony of Charles Boyden.)

Q. Did you derive any help from those circulars in designing the Mogul? A. I did not.

Q. Didn't you look at the circulars?

A. Certainly.

Q. Didn't you take, borrow, what you could from the disclosures in those circulars?

A. I didn't need to.

Q. What do you mean, didn't need to?

A. There was nothing new, nothing new disclosed. This French gun had all the enclosed gear housing and all that, and I got that idea from that gun, and the rest of it works out that way, is all.

Q. You testify, do you, now, then, that you derived no benefit from the circulars of the plaintiff's patented gun [178] in your designing of the Mogul?

A. I would say so, yes. I say so.

Q. Didn't you get any ideas at all from the circulars of the plaintiffs' patented gun, which you incorporated in the Mogul?

Mr. Litzenberg: Well, the witness has testified that he did not, your Honor.

The Court: Let him be more specific, if he can. Did you get any ideas?

A. I don't recall of getting any.

Q. By Mr. Huebner: Did you seek any?

A. No. The guns, if you compare them, you will find they don't work anything alike. Certain fundamental ideas are there.

Q. Did you study the circulars of the plaintiffs'

(Testimony of Charles Boyden.)

patented gun, with the idea of deriving any teaching from them? A. No.

Q. You didn't attempt to understand the disclosures on these circulars of plaintiffs' patented gun?

A. We no doubt studied the circulars. We studied all competitive equipment circulars.

Q. Didn't you study the plaintiffs' circulars of the patented gun very closely, in order to gain knowledge or information from them as to the construction of the gun?

A. I no doubt did, as to the construction of the gun. [179]

Q. What, if anything, did you learn from your examination of those circulars? A. Nothing.

Q. Do you have present in court one of the circulars that you did examine and derived nothing from it?

A. It was introduced as evidence here. It was introduced as evidence here yesterday, circular 500.

Q. Circular 500?

Mr. Litzenberg: No, it wasn't introduced yesterday.

A. Well, it was in connection with that letter.

Mr. Litzenberg: That is one that we would like to introduce.

Mr. Huebner: Do you have one of those circulars that the witness is referring to?

The Witness: We probably have circular 500.

Mr. Blount: I object to the witness from the

(Testimony of Charles Boyden.)

witness stand aiding his own counsel or giving the answer, and ask that the statement be stricken.

The Witness: I am sorry.

The Court: It may be stricken.

Mr. Litzenberg: I will present counsel a copy of the bulletin referred to, Bulletin 500, copyrighted in 1934, by H. B. Rice, which shows a cut of the gun referred to in the patent sued on.

Mr. Huebner: May I show this to the witness?

Mr. Litzenberg: You may. [180]

Q. By Mr. Huebner: Is this Bulletin 500, which your counsel has produced, the circular to which you have been testifying? A. It is.

Q. Were there any other circulars than that one which you examined in an effort to learn what the Metal Spray Company was doing?

A. That is the only one I know of, recall.

Q. When did you first see this circular, this Bulletin 500?

A. Oh, I don't remember that. No doubt very shortly after it came out.

Q. But you are not able to fix with any certainty the date? A. No, I can't.

Mr. Huebner: Then I will ask that this be marked for identification.

Mr. Litzenberg: We are agreeable that you can have it introduced.

The Clerk: Plaintiffs' Exhibit 15.

The Court: Counsel consents that it may go into

(Testimony of Charles Boyden.)

evidence, if you choose. He says he has no objection to it being filed.

Mr. Litzenberg: The fact of the matter is, I would like to have it introduced either as plaintiffs' or defendants' exhibit. [181]

The Court: Sometimes counsel, without stipulation, hesitate to offer certain proof.

Mr. Huebner: I think, your Honor, we will defer offering it until further proof.

The Court: Very well.

Q. By Mr. Huebner: Mr. Boyden, where did you get this Bulletin 500?

A. One of our salesmen—no doubt one of our salesmen picked it up somewhere.

Q. And this one here?

A. That came from Mr. Britton.

Q. What is Mr. Britton's full name?

A. William M., I think, Britton.

Q. When did that come to you from Mr. William M. Britton?

A. Oh, a few months ago, three or four months ago.

Q. And what was the occasion of his providing you with it?

A. Well, he came out to California to start to live here. And Mr. Britton sells metal spraying guns in Detroit, or at least he did, the Britton gun, and he came out and called on me to say "How do you do." And we had never met, and I believe he called on others here in the metal spraying indus-

(Testimony of Charles Boyden.)

try, and just introduced himself around through the trade. And while he was there we discussed various things, among which was the patent suit, and while [182] discussing it he volunteered that he thought he had some information, in fact he thought he had some correspondence——

Q. Just a minute. I don't want to interrupt your answer, except to caution you against any hearsay testimony.

A. It wasn't hearsay. This came direct from him.

Q. Well, that would be hearsay, and I don't wish you to make—I don't want you to quote what he said. I just want you to tell the circumstances of your receiving it, what you yourself observed, and how you happened to get it.

A. He brought it to me.

Q. And when did he bring it to you?

A. Well, I wouldn't know. I really don't know. It was some time ago. It was some time ago.

Q. Have you ever had in your possession any other copies of that same bulletin?

A. Oh, yes. That was shortly after the Metalspray gun came out.

Q. The bulletin came out shortly after the Metalspray gun came out?

A. I say I had one shortly after the Metalspray gun came out.

Q. Where did you get that one that you had in

(Testimony of Charles Boyden.)

your possession shortly after the Metalspray gun came out?

A. I got it from one of our salesmen—picked it up somewhere.

Q. Do you know who? [183]

A. I don't know. We had three or four men.

Q. You have identified two of these bulletins, one that one of your salesmen picked up, and one that Mr. Britton handed to you?

A. That is the only bulletin I have seen.

Q. Which one?

A. The only one that has been handed to me, as far as I know.

Q. The one I handed you a moment ago, marked for identification, Bulletin 500? A. Well——

Mr. Litzenberg: I think counsel is trying to confuse the witness. There is but the one circular. There may be other copies of it.

Mr. Huebner: I don't want to confuse the witness. I will refer to copies. This particular specimen is the copy which Mr. Britton gave you?

A. If I may ask Mr. Litzenberg if it is, I can answer the question. I don't know how many thousands of those were printed.

Q. Well, I don't want you to confer with counsel while you are on the witness stand. I want to know whether you are able to identify that particular specimen of Bulletin No. 500.

The Court: He answered, "I do not know," already.

(Testimony of Harry B. Rice.)

feature that counsel refers to is an entirely different matter. In oxy-acetylene equipment [193] we always avoid pockets or openings which may permit the accumulation of these combustible gases. In the old Schoop gun or the old Metallizing gun, or in any gun having an entirely enclosed section which is fastened permanently to the rear of the nozzle, it is possible to obtain an accumulation of combustible gases, if the wire is not in the nozzle at the time of the ignition of the nozzle, or if the wire is of a much smaller size than the wire orifice.

Q. I think that may be quite sufficient, unless counsel——

A. I was going to say that it is very seldom that an explosion of that kind is possible.

Q. It is not a common thing?

A. Yes, and we don't like——

Q. May I ask if this company or fictitious firm owned any patents at that time?

A. Not to my knowledge.

Q. Not to your knowledge? A. No.

Q. When did you first become acquainted with Mr. Lensch and Mr. Leder?

A. After leaving the Metallizing Company, I would say, probably, I think, in the spring of 1931.

Q. Were you ever associated with them in business? A. You mean thereafter?

Q. Yes. [194]

A. Yes. We made an arrangement whereby we

(Testimony of Harry B. Rice.)

did job and custom work, under the name of the Metal Spray Company.

Q. Was that an incorporation?

A. That was not incorporated.

Q. Who composed that firm?

A. The arrangement might be called exceptional. The Metal Spray Company was registered in the county with myself as the sole owner, except that we were, to a practical extent, partners, that is, Lensch, Leder and myself. Mr. Lensch had the shop, located at 113 Llewellyn Street, the shop and equipment, and Mr. Leder at that time was working there. He supplied the labor in connection with metallizing and spraying. [195] I did the field work, developed applications, obtained jobs and business, brought them in, invoiced the jobs, and collected the money on all of the invoices. The official location of the business was at 113 Llewellyn Street. All of the invoices bore that address and all checks were mailed to that address. After the moneys were collected, we had an arrangement of division whereby I paid Mr. Lensch first the actual amount of money he paid out on materials and then the balance was split three ways between myself and Mr. Leder and Mr. Lensch.

Q. By Mr. Litzenberg: What machine were you manufacturing at that time?

A. At that time they used a gun that they had constructed and which, I think, at that time they

(Testimony of Harry B. Rice.)

also had a patent on. I learned of the patent and that is how I got in touch with them.

Q. How would you designate or identify that machine, if you can say?

A. That machine was a box type of gun. I say box type because I used that term in connection with both the Schoop and the early Metallizing gun. It was a box type of gun very similar in construction to all box types of guns, such as Schoop and the old Metallizing, except for possibly two details. One detail was a different nozzle construction, an unique nozzle construction. And I think that they obtained claims in the patent upon that nozzle. In other [196] respects it was very similar to previous types of guns then used.

Q. I refer to patent No. 1,987,016 to Lensch and Leder, which I believe has been introduced as one of the defendants' exhibits, and will ask you if that patent discloses the machine that you have been talking about.

A. It does not.

Q. It does not?

A. No. It is the previous patent to this.

Q. The previous patent to that?

A. Yes; the previous Lensch and Leder patent to that.

Q. I guess that patent has not been presented on either side. Do you know anything about this patent No. 1,987,016 to Lensch and Leder?

A. I am familiar with it.

(Testimony of Harry B. Rice.)

Q. Will you explain whether or not that gun was being manufactured by Lensch and Leder and distributed by you, if that was the arrangement?

A. At what time?

Q. At the time of which you speak now.

A. Not when I first made the arrangement with them; no.

Q. Do you remember when this was developed?

A. This gun was developed, I would say, in August or September of 1931. It was the spring of 1931 I went with them. I would rather specify it in this way. This gun was developed within six months of the time I entered the [197] arrangement with Lensch and Leder. I am quite certain that would be August or September of 1931.

Q. And the gun, according to the specifications shown in this patent, was actually manufactured and sold by you?

A. Do you want the time?

Q. No. I mean whether or not it was.

A. Yes; it was.

Q. Now, if you can state just briefly, give the period in which that gun was distributed.

A. I will have to go into some detail.

Mr. Huebner: Your Honor, I object to this on the ground it is not material. It doesn't seem to be prior art. The patent speaks for itself. And there were guns made and sold by Lensch and Leder or, rather, the Metal Spray Company, according to that.

Mr. Litzenberg: I am just leading up to the de-

(Testimony of Harry B. Rice.)

velopment which resulted in the present gun and its development which was later patented. That makes a connecting chain, showing the true history and development.

The Court: You may answer.

A. Will you repeat the question, please?

(Question read by reporter.)

A. It was developed in August or September, 1931. The first of this series was sold, as my memory serves me, shortly before Thanksgiving of 1931. It was not circularized or offered to the general trade until the spring of [198] 1932.

The Court: We will take a recess until 2:00 o'clock this afternoon.

(Whereupon a recess taken until 2:00 o'clock p. m. of this day, Thursday, May 2, 1940.) [199]

Afternoon Session

2 O'clock.

(Parties present as before.)

Mr. Litzenberg: We will recall Mr. Rice.

HARRY B. RICE,
recalled.

Direct Examination
resumed.

Q. By Mr. Litzenberg: Mr. Rice, this morning you referred to the first patent taken out by Lensch

(Testimony of Harry B. Rice.)

and Leder. I will ask you to look at that patent and state whether or not that is the first patent ever taken out by Lensch and Leder so far as you know. A. Yes, sir.

Q. Is that the one to which you referred this morning? A. That is the one.

Q. Was that gun ever manufactured to your knowledge? A. Yes; it was manufactured.

Q. To what extent?

A. Two or three models.

Q. It was never manufactured for sale?

A. I don't think any of them were sold. They were used in the shop in custom work.

Mr. Litzenberg: It might be well to introduce this copy of the Lensch patent No. 1,776,332, issued September 23, 1930, for a metal spraying device. I ask that it be [200] marked as a defendants' exhibit.

The Clerk: Defendants' Exhibit L.

Mr. Huebner: May I ask for what purpose the patent is offered in evidence?

Mr. Litzenberg: Just to connect the three different patents issued.

The Court: In the development of the art, I suppose. Is that it?

Mr. Litzenberg: Yes.

The Court: Very well; it may be admitted.

Q. By Mr. Litzenberg: When court adjourned this morning, Mr. Rice, you had been describing the spray gun as covered in the second patent and

(Testimony of Harry B. Rice.)

I believe it was referred to as Model No. 125. To what extent was that model manufactured for sale?

A. Well, the purpose of manufacture was to bring out the sale of the gun. It was handled in the customary manner and photographs were taken of it, especially of the gun disassembled. A photograph was taken in order to make a parts sheet and photographs were made to make cuts in order to print a circular, to support the circular that I got out for it.

Q. In other words, it was offered to the market or on the market? A. Yes.

Q. To the trade? [201]

A. Yes.

Q. Did that gun give complete satisfaction if you know?

A. No. It was apparently very satisfactory for awhile, as it was put into the field.

Q. What, if any, objections developed in connection with it?

A. Do you want me to describe them in detail?

Q. Oh, yes; just point them out generally.

A. The first gun manufactured by Lensch and Leder, as I think I said before, was a box-shaped gun similar in general design to the Schoop gun and of the old Metallizing gun.

Q. You are referring now to Defendants' Exhibit L, just introduced? A. Yes, sir.

Q. But I am referring now particularly to Defendants' Exhibit K, which is the second patent.

(Testimony of Harry B. Rice.)

A. If I may have these copies, I can explain it. The first gun was a box-shaped type of design, whereby the rear of the nozzle opening was directly connected with the gear case, which to my mind was objectionable in the sense that it would permit the accumulation of gases. For that reason I strongly advocated a gun whereby the nozzle would be removed, or the rear of the nozzle, rather, would be removed, from an opening into the gear case. In other words, I term it outside wire feeding wheels. I strongly advocated the [202] use of outside wire feeding wheels and suggested that it would be quite simple to run a shaft through the case and apply feeding wheels thereto and move or separate the nozzle from the case. The second gun brought out effected both changes quite satisfactorily at the time.

Q. Were any objections developed in connection with the second gun?

A. The objections developed to the second gun, after it had been in the field for six months or a year, were the fact that the outside wire feeding wheels were supported only on one side of the case. I thought it would be an excellent idea to incorporate a bearing on the outside or, rather, on both sides of the wire feeding wheels. And the second objection was the fact that in the Model 125 gun—I don't know what exhibit this is—the tension spring used to exert pressure on the upper wire feeding wheel in order to hold the wire in feeding

(Testimony of Harry B. Rice.)

position was a fixed spring tension and not subject to manual variation.

Q. By The Court: A screw adjustment?

A. Yes, sir. It was not subject to it. With the various wires that were used, that would cause sometimes slippage as between lead and steel. It might work all right with steel but might gouge lead and so forth.

Q. By Mr. Litzenberg: I think that might be sufficient for that. In connection with the sale of that machine, what next was done in the way of the final machine, [203] the development of the machine, which is now sold and which is the subject of the patent in suit?

A. That introduced another step from this gun to Model 126.

Q. Yes.

A. Messrs. Lensch and Leder made the changes and brought out the Model 126, incorporating an outside bearing on the feeding wheels, keeping the rear of the nozzle separate from the gear chamber and, in addition, effecting a much better balanced gun.

Q. I hand you a copy of the patent in suit, which I believe you are describing at the present time.

A. Yes, sir.

Q. And I will ask you just to state briefly something of the improvements and the time that they were developed, if you can, improvements which led to the production of that gun.

(Testimony of Harry B. Rice.)

A. Comparable improvements with the older gun?

Q. Yes.

A. One thing I liked very much was the elimination of grease cups, the elimination of outside grease cups.

Q. When was this new gun developed, about when? A. The gun that is in suit?

Q. The gun of the patent in suit.

A. This gun was developed, based upon memory, which has been checked recently by some correspondence I have [204] found, and as I would estimate, in December of 1923 or January of 1934. By that I mean the first model of the gun.

Q. Tell just a little bit about the building of that first model, how it was brought up to the place where it was ready to submit to the public.

A. Do you mean from that point on, from the first model on?

Q. Yes.

A. From the first model on the customary practice was observed of testing in the shop particularly to obtain gas consumption ratios compared with the previous gun to find out the proper pressures to use on oxygen, acetylene and air, and the volume of deposits, the volume of metal deposits. All this information was necessary for me to write a manual of instructions which had to accompany the gun. I would state that these tests went on for probably 30 days and then probably we all agreed

(Testimony of Harry B. Rice.)

Q. And do you happen to know from anything appearing thereon to whom that letter was sent?

A. Yes.

Mr. Huebner: Just a minute. I object to the question in the form it is, that is, whether it has anything on the letter. If the question is does he have a personal [207] recollection as to whom the letter was sent, there will be no objection.

The Court: That is a proper limitation.

Q. By Mr. Litzenberg: Do you have personal knowledge or recollection to whom that letter was sent?

A. Do you mean a specific person?

Q. Yes. A. No.

Q. That particular letter there?

A. Well, without reference to the letter——

The Court: Or any of them particularly.

A. Yes; I know where most of the letters were sent.

The Court: We want the names and time now. That must be exact.

Q. By Mr. Litzenberg: Please state to whom that letter was sent.

A. It was sent to Mr. Britton.

Mr. Huebner: Do I understand the witness testifies he knows of his own knowledge, without reference to this copy, that this particular specimen went to Mr. Britton?

A. May I ask for information?

The Court: Yes.

(Testimony of Harry B. Rice.)

A. I don't know except for the fact that I have a longhand note on the bottom of this letter. Otherwise, I would not know this letter was sent to Mr. Britton.

Q. By The Court: Does the memorandum which you made [208] in your own handwriting, which appears, as you say, on the letter, refresh your memory so that you can be certain about it?

A. Yes, sir.

The Court: Very well.

Q. By Mr. Litzenberg: That letter is signed by your original signature, is it? A. Yes, sir.

Q. And there is an original memorandum in your own handwriting on that letter, is there?

A. Yes, sir.

Q. Will you please read the memorandum to which you have referred?

A. "Mr. Britton: Under another cover, by airmail, am sending essential pages of the manual. The complete manual is going forward by regular mail." [209]

Q. In this letter is there referred to any other document other than what you have just read, which was sent with the letter?

Mr. Huebner: Objected to as incompetent. The letter speaks for itself.

The Court: Yes.

Q. By Mr. Litzenberg: There is reference in that, I believe, to a bulletin. Will you please state what that reference is?

(Testimony of Harry B. Rice.)

Mr. Huebner: I am going to object to this unless the letter is offered in evidence.

Mr. Litzenberg: I am going to offer the letter in evidence.

Mr. Huebner: I am objecting to the question on the ground that it is incompetent.

The Court: You are asked if it is referred to. That is the question. Just read it, please.

(Question read by the reporter.)

A. Yes.

Q. By Mr. Litzenberg: Will you state what document is referred to? A. Bulletin 500.

Q. Do you have copies of that Bulletin 500?

A. I have one.

Q. Will you produce it?

Mr. Litzenberg: I believe there is one here that was [210] with the letter yesterday.

The Witness: I have one.

Q. By Mr. Litzenberg: Is that the document referred to in this circular letter? A. It is.

Mr. Huebner: Just a minute. Please don't answer so quickly.

The Witness: I beg pardon.

Mr. Huebner: Because I want to get an objection in. I object to that question. I would like to have it read, because I want to enter a specific objection.

The Court: Very well.

(Question read by the reporter.)

Mr. Huebner: I object to that on the ground that it is irrelevant and immaterial, unless the question

(Testimony of Harry B. Rice.)

is limited to whether this particular copy that the witness has produced is the copy which went with the letter.

The Court: I will allow him to answer yes or no, and we will see.

Mr. Litzenberg: I believe he already answered that it is.

The Witness: Yes.

Mr. Litzenberg: If the court please, the same circular which was presented yesterday in the discussion and marked Exhibit 15 for identification was the——

Mr. Huebner: Just a minute. I object to counsel [211] starting to testify and prompting the witness.

Mr. Litzenberg: I was going to simply state that this was the document furnished to me with the letter when the matter was brought to me. They were coupled together. All of these circulars are identically the same, all from the same print. Now, if counsel is going to contend that the specific circular which was sent with this specific letter is necessary, then, from the best evidence we have, this is the one which went with the letter and which was furnished by Mr. Britton with the letter.

The Court: I suppose his point is that you would have to ask that the original be produced that was sent.

Mr. Huebner: That is my point.

The Court: I will sustain the objection.

(Testimony of Harry B. Rice.)

Q. By Mr. Litzenberg: Are you in a position to tell, Mr. Rice, whether or not that circular marked 15 for identification was the circular sent with this letter which you have identified?

A. These are not the same.

Mr. Huebner: May I have that question read, and the answer, your Honor?

The Court: The answer is, "These are not the same."

Q. By Mr. Litzenberg: What makes you think they are not the same? Is there any difference in the composition, or is it something else?

A. I think this is the circular I produced. [212]

Mr. Huebner: You are holding in your hand one which has not been marked?

A. Which I produced. This is the exhibit. This is the exhibit here. I don't know where I got this circular. It is not identical with this.

Q. By Mr. Litzenberg: In what respect?

A. It is a later print.

Q. Is there any difference in the composition?

A. This was put out—this was issued at a much later date by Metal Spray Company, Inc.

Q. Will you please explain at this point the difference between Metal Spray Company and the Metal Spray Company, Inc.?

A. In 1935, September 17th, to be exact, the Metal Spray Company, unincorporated, the previous company, was taken over by the Metal Spray Company, Inc., a corporation, formed by Mr. Martin

(Testimony of Harry B. Rice.)

and myself. This purports to be, this circular which I produced here from my portfolio, is a reprint, a copy of the original circular, with the name Metal Spray Company, Inc., attached thereto.

Q. And is that the only difference?

A. That is the only difference.

Q. And the first Metal Spray Company was the fictitious name; is that correct? A. Yes, sir.

Q. Are you in a position to say that the circular which you have just presented was the one presented with [213] the letter, or is it the other circular?

A. This circular is the one presented with the letter.

Q. The circular that was issued by the Metal Spray Company, the fictitious name?

A. Correct, yes, sir.

Q. That was sent with the letter?

A. That is a correct copy of Bulletin 500, which was sent with the general letter. Does that answer the question?

Q. Yes. What is shown on that circular, what gun? A. The model 126.

Q. Is that the gun that you referred to a while ago when you were testifying in regard to the completion of one of the first guns of the new model?

A. Yes, sir.

Q. Did you have anything to do with the printing of that circular and the photographing of the gun?

(Testimony of Harry B. Rice.)

A. I composed the circular and arranged the cuts in the illustrations.

Q. So of your own knowledge that circular was prepared, and the photographs taken from the first gun produced?

Mr. Huebner: The witness didn't so testify, and again Mr. Litzenberg is leading the witness, and it is his own witness, your Honor.

The Court: Read the question, please, Mr. McClain.

(Question read by the reporter.) [214]

The Court: Answer the question. From your own knowledge, of what gun was that a photograph?

A. From my own knowledge, the photographs contained in Bulletin No. 500, this circular, were taken from one of the first models of this type of gun produced.

The Court: Which one?

A. The model 126, the gun which is in suit.

Q. By Mr. Litzenberg: I notice those circulars are marked "Copyrighted." Will you please explain what, if anything, was your practice in regard to issuing circulars?

Mr. Huebner: That is objected to as irrelevant and immaterial, unless the question is confined to what he did in respect to this particular circular.

The Court: Sustained.

Q. By Mr. Litzenberg: Is that document copyrighted?

A. Yes, sir.

(Testimony of Harry B. Rice.)

Q. When was it copyrighted? A. In 1934.

Q. Did you usually copyright your circulars?

Mr. Huebner: The same objection.

The Court: I will allow him to answer as to whether in that respect the act of copyrighting was special in this case. Was it special or a general practice? A. General practice.

Mr. Litzenberg: That is all I wanted, that it was general practice to copyright their special circulars.

[215]

Q. By Mr. Litzenberg: Now, in handling your business, did you have a dealer in San Francisco?

A. Yes, sir. What year? Pardon me.

Q. Back in 1934? A. Yes, sir.

Q. Who was that dealer?

A. DeLaval Pacific Company.

Q. Did you have any correspondence with them at this time in regard to the new gun which had been developed, and which—— A. Yes, sir.

Mr. Huebner: Just a minute. Please don't answer so quickly.

The Witness: I will try.

Mr. Huebner: Counsel hadn't even finished his question. Had you?

Mr. Litzenberg: Yes, just about.

Mr. Huebner: I object to that on the ground that it is not material or relevant, and is outside of the scope of the amended answer.

Mr. Litzenberg: No. You don't understand what I am leading to. I propose to show by the corre-

(Testimony of Harry B. Rice.)

spondence that this new gun was ready for distribution, that the correspondence was had with this representative in San Francisco, in which correspondence the date is more or less definitely fixed as to when the gun was ready for shipment. [216]

The Court: The objection will be overruled.

The Witness: Repeat the question, please.

(Question read by the reporter.)

A. Yes, sir.

Q. By Mr. Litzenberg: Will you produce that correspondence? A. Yes, sir.

Q. I will ask you, Mr. Rice, just to state and identify the different letters, giving their dates, that are in this bunch of correspondence which you have produced.

Mr. Huebner: Again I object, your Honor. The statement made by counsel at the last hearing and his amendment to the answer, coupled together, permit him to bring to the court's attention, if it is relevant, competent and material, one letter, which the witness has already discussed, and transactions occurring between two people, a Mr. Britton and the witness, Mr. Rice. Now, counsel specifically limited himself to two witnesses, involving transactions between those two people, and there is just the one letter which he says Mr. Rice sent to Mr. Britton, and any of these other letters are outside the issues as framed.

Mr. Litzenberg: Counsel is in error in regard to limiting it to the question of any one letter. I gave

(Testimony of Harry B. Rice.)

the names and addresses of the men who would be presented as witnesses, and this is all in connection with the main transaction which we are undertaking to establish, referring [217] to the same gun. It is very pertinent to bringing out the truth in connection with the whole transaction.

Mr. Huebner: I have the transcript here, if your Honor cares to hear it.

The Court: My general understanding was, when the question was raised, that this was to be brought in as a defense in general, without limiting it to a particular letter or document.

Mr. Litzenberg: Certainly that was the intent.

The Court: That is my understanding.

Mr. Huebner: On page 102 of the transcript, Mr. Litzenberg said:

“The men are here in court at the present time, the sender, writer of the letter, and the man who received the letter.”

Well, the court asked Mr. Litzenberg a question: “That is the only special matter?”

And then it was amplified by Mr. Litzenberg as follows:

“Yes, that is the only special matter. The men are here in court at the present time, the sender, writer of the letter, and the man who received the letter. And they are in the position of those who were offering these inventions to the public and sending out the bulletins which had been

(Testimony of Harry B. Rice.)

prepared for that purpose, and which definitely disclosed the invention that was made the subject matter of an application more than two years afterwards. [218]

“Mr. Huebner: I am asking you to state now, so that we can prepare to meet it, the name or names of individuals whom you say had this knowledge.

“Mr. Litzenberg: Well, Mr. William M. Britton. Mr. Britton, will you give your address?

“Mr. Britton: 1741½ West 46th Street, Los Angeles.

“Mr. Litzenberg: And Mr. H. B. Rice, the man who wrote the letter.”

Who wrote the letter—I will emphasize that. [219]
Then Mr. Litzenberg:

“Will you state your address, Mr. Rice?

“Mr. Rice: 3835 Pine Street, Long Beach.

“The Court: Those are all?

“Mr. Litzenberg: Yes, sir.”

Mr. Litzenberg: Those were all the witnesses.

The Court: Well, the question is whether you limited yourself to the single letter, is the only question.

Mr. Litzenberg: I certainly didn't intend to.

Mr. Huebner: And further over, on page 103, Mr. Huebner said:

(Testimony of Harry B. Rice.)

“Well, to whom did the particular letter go that you are intending to offer in evidence?”

“Mr. Litzenberg: It was mailed to Mr. Britton, who received it and had it in his possession. And there was a personal note in long-hand, written in ink, addressed by Mr. Rice to Mr. Britton, the letter being signed by Mr. Rice,

“Mr. Huebner: That is the full extent of the material that you propose to offer on this special defense, is it?”

“Mr. Litzenberg: On that particular defense.

“Mr. Huebner: Are there any other defenses that are not pleaded in the answer that you are going to offer?”

“Mr. Litzenberg: No; nothing but what has been specifically stated.”

Mr. Litzenberg: This is all the same defense, absolutely, proving the same allegation. Our contention is that [220] under the new Federal rules of procedure this can be presented and should be presented.

Mr. Huebner: But counsel's statement was in the nature of a bill of particulars, upon which we have relied, and under the new rules a bill of particulars is just as binding upon the party making it as it was under the old federal rules.

Mr. Litzenberg: This couldn't change and can not change your attitude or what you could accomplish if you knew it a month before.

(Testimony of Harry B. Rice.)

Mr. Huebner: That doesn't matter.

Mr. Blount: How do we know?

The Court: I will allow you to make the proof, subject to objection and exception, with the proviso that if the other side needs more time to meet this additional matter, they shall have it, and at the defendants' cost.

Q. By Mr. Litzenberg: Now, Mr. Rice, will you please state, just refer to the letters, giving the dates, from whom and to whom they were written, in these few letters you have presented here?

A. Letter—copy of letter of March 17, 1934, which I wrote to De Laval Pacific Company, San Francisco.

Mr. Huebner: May I suggest, your Honor, that it is somewhat out of order to show the witness a letter and start asking questions about it without offering it to opposing counsel. [221]

The Court: You have a right to inspect it.

Mr. Huebner: We haven't any idea what is in these.

The Court: You can identify the letters, from whom and to whom, and let counsel examine them.

Mr. Litzenberg: That is all I am asking him to do at this time, to state the titles, the dates, and to whom written.

The Court: He may do that.

A. Attention of Mr. George Stoddard.

Q. By Mr. Litzenberg: And the next one?

A. Copy of letter of February 24, 1934, to the

(Testimony of Harry B. Rice.)

same party. Original letter of February 19, 1934, from De Laval Pacific Company to me, to the Metal Spray Company, my attention.

Mr. Huebner: In reference, your Honor, to these purported letters, all but one of them appear to be carbon copies; and they are objected to and any testimony concerning them is objected to on the ground that they are not the best evidence. These carbon copies constitute a mere self-serving declaration and they are not admissible unless the originals are produced.

The Court: The objection is well taken except if it becomes material to show that that office dictated something; not that it was received. I shall have to sustain the objection unless the failure to produce the originals is satisfactorily accounted for. [222]

Mr. Litzenberg: If the witness can give personal knowledge that these are his own personal carbon copies, that he wrote them, and they have been in his possession all of this time, and that he, himself, is producing them, wouldn't they be admissible?

The Court: As I suggested, if it is competent, you may show that they did compose such letters; not that they were sent or received. The record may show they composed certain letters but, of course, the originals are the best evidence, or you may show by the production of the party who received them that they have been lost.

(Testimony of Harry B. Rice.)

Q. By Mr. Litzenberg: I will ask you, Mr. Rice, if these carbon copies are copies which you, yourself, composed. A. They are.

Q. Have they been in your possession all of this time?

A. All of this time is a general term.

Q. Since the time of their writing?

A. No.

Q. Or under your general control?

A. My general control; yes.

Q. I will ask you to refer to the letter, dated March 17, 1934, addressed to the De Laval Pacific Company, 61 Beale Street, San Francisco, for the attention of George Stoddard, and simply read one paragraph, opposite which there is a mark, and which refers to the matter in issue.

Mr. Huebner: The same objection, your Honor. It is not [223] the best evidence.

The Court: How far do you expect to go on that?

Mr. Litzenberg: No further than the contents of this particular letter. And, if the original can be had, we certainly shall be glad to obtain it.

Mr. Huebner: I don't think he is entitled to any part of it any more than he is the whole. One sentence might be misleading.

The Court: If you want to prove that there was work on it at a certain time and that they made certain memoranda in their offices and that there are dates attached by which they can prove dates to show the subject matter that they were working

(Testimony of Harry B. Rice.)

on at that time, you may do so. But we have to stop right there with whatever competency that has. If they sent out a letter to some third person and that person received the letter containing the communication therein, then you have got to either produce that person to have him testify that he received such letter and have him produce the original or say that he has lost the original and that that is a copy of the letter. We have two steps there. The objection on the ground it is incompetent is well taken.

Mr. Litzenberg: This letter is written to a dealer and it was written for the purpose of advising the dealer in regard to the gun which is the subject of the patent in issue. It is just a scrap of evidence, of course, and the [224] personal, first-hand knowledge of this witness as to what he said at that time in that letter. It may be that the original could be had but I know nothing about it.

The Court: Do you think that in the ordinary course of a trial a party could show that he sent out a letter by producing from his file a carbon copy, not the original letter that was sent, and say, "This is a carbon copy from my file"? Do you think that is first-class evidence where an objection is made that it is secondary?

Mr. Litzenberg: No; it is not the best evidence, of course. But the question is whether it can not be entered for whatever value it may have.

(Testimony of Harry B. Rice.)

The Court: I say he may testify that that was a memorandum they made at the time in their own office, which will show they had this subject matter in hand, to whatever extent and pertinency it may go. But then we stop right there.

Mr. Litzenberg: That is the purpose.

The Court: What he said to the other party as a communication is not properly before the court. If he is describing something and he says, "We made that memorandum at the time and it was a part of our office files," he may testify to it. It would show that the subject matter was up.

Mr. Litzenberg: Can the witness then read this particular paragraph on that basis?

The Court: If you want him to.

Mr. Litzenberg: I will ask the witness to read the [225] fourth paragraph from the letter referred to.

Q. By The Court: That letter was dictated, as you say, by you and it was filed in your office at that time, on the date it bears, wasn't it?

A. Yes, sir.

The Court: Very well. You may read it.

A. "There will not be sales made at the old and higher prices, I am sure, but, if there is, you may have the difference. As I said before, I am worried very much about getting your guns sold before the new guns are issued (which will be a week from today) because I know they just will not sell thereafter. I am not concerned about the few old guns we have on hand, as, if necessary, we will arbi-

(Testimony of Harry B. Rice.)

trarily set prices upon special prospective occasions that will sell them and divide the differences or losses between us, but with your guns I will have to stand the loss alone”.

Q. By Mr. Litzenberg: And the date of that letter is what? A. March 17, 1934.

Mr. Huebner: I move to strike the testimony of the witness, where he quoted from this alleged letter, on the ground that it is incompetent, irrelevant and immaterial. It is incompetent for the reasons which have already been stated. It is immaterial because it is not an offer of a gun for sale and, under the rule which your Honor has made, it could not be so construed because it is not a communication to a third party.

The Court: As to whether it is complete or not or is only a circumstance is a matter to be argued. I will still adhere to my ruling as before but thus far it has been shown they did have an office record referring to certain matters at that time. [227]

It may be only a circumstance tending to show that they did perfect their nozzle at that time. That may be argued for what it amounts to. The motion will be denied and an exception noted.

Mr. Litzenberg: Should this letter be offered in evidence? Do you want it in evidence?

Mr. Huebner: I don't want it offered in evidence.

Q. By Mr. Litzenberg: Mr. Rice, are you familiar with other spray guns that are on the market? A. Quite; yes, sir.

(Testimony of Harry B. Rice.)

Q. Will you mention some of the guns that you are familiar with? A. At the present time?

Q. Yes.

A. There is the Metallizing Engineering gun called Metco, made in New York City, the Stevens gun, made in San Francisco, the Valentine gun, made in Los Angeles, the Britton gun, made in Los Angeles, and the Rose-Engles gun, made in Wilmington.

Q. Have you any circulars that show these guns that you could produce?

The only purpose in producing these guns or circulars is to show the general construction of the guns that are on the market and to show that practically all of them are guns that are substantially closed construction.

Mr. Huebner: That is objected to as irrelevant and [228] immaterial unless it is part of the prior art.

The Court: Is that what is claimed for it?

Mr. Litzenberg: No; we are not submitting it as prior art. Counsel, I think, is right so far as pertinency is concerned, other than to show the general construction of the gun is more in accord with the Mogul gun than with any of the other guns that are on the market.

The Court: We don't know who they were copied from. The objection is sustained.

Mr. Litzenberg: That is true. They all copy from the others. You may take the witness.

(Testimony of Harry B. Rice.)

Mr. Huebner: May we have a short recess at this time, your Honor?

The Court: Yes.

(Short recess.)

Mr. Litzenberg: If the court please, I would like to have this Exhibit No. 15, which was marked for identification and was separated yesterday from the letter, introduced with the letter as our exhibit because they were clipped together and should be kept together.

The Court: Very well.

Mr. Huebner: It is objected to as not properly proved and as not the best evidence.

The Court: I will allow it to be filed and an exception may show.

The Clerk: Defendants' Exhibit M. [229]

DEFENDANTS' EXHIBIT M

Subject: New Type Gun.

Los Angeles, Calif.

April 5th, 1934.

To All Distributors and Agents:

During the past two years we have had many helpful and constructive suggestions from the various territories and from many individual users concerning improvements in design of our guns. At all times we have given very careful consideration to every comment offered, usually we have been able to confirm the results reported by checking in

(Testimony of Harry B. Rice.)

our plant or through local sources. When it has been established that a certain change is desirable and it has been found possible to incorporate same in the present design, we have taken immediate action. Since the Models 80, 125, and 186S were first offered about three years ago there have been a great many improvements and changes applied as a result of experience and field suggestions. As a result, the present models are quite different from the original issues. Even so, several guns sold during 1930 and 1931 are still being used and giving satisfactory service. Of course, many of these models, with improvements cited, are in use in every district which were purchased during the past two years and most of these customers are convinced they have the best gun on the market, are fully satisfied with the results obtained, are good references, and some of them may continue to specify similar models for future requirements. For this reason this type and these models will continue to be manufactured as long as the demand exists.

However, as the result of the many suggestions made and the experience gained, it became evident over a year ago that an entirely new design of gun was necessary to add some of the changes that seemed desirable. It is of course one thing to decide that a certain change in the operation of a device is advantageous; it is quite another thing to be able to incorporate this desirable change into a workable

(Testimony of Harry B. Rice.)

design. Although we are constantly experimenting on new designs of guns we decided early in 1933 that to obtain certain desirable results we would have to completely change the design of our gun, and we immediately began centering all of our efforts to accomplish this result. It is no easy matter to perfect a new design of metal spray gun. The number of drawings, patterns and set-ups runs into figures that it is best not to specify as few would believe. We obtained the final design desired about six months ago and since then have been using it on every type of job possible to check the results and add minor improvements. Although all of these tests and trials have proven fully we have a splendid gun, any one of you has had enough experience to realize that the design principals which we have been able to put into this new type answers all previously discovered weak points.

So we feel that you have all contributed in producing the new type gun as described in bulletin 500. And we believe that you will all recognize it as being as far in advance of the older type as our first guns were compared with all competitive guns. You need offer no apologies to any recent purchaser of the older type guns. They have a gun that is distinctly superior to any competitive gun. This is not theory; 68% of our sales since January 1st have been to customers having competitive guns. While

(Testimony of Harry B. Rice.)

over a period of three years there is but one single instance where *on* of our customers has purchased a competitive gun, and that customer openly expresses his regret. We number some of the largest industries as satisfied users and boosters for 1933 models of guns, and we frankly believe some of these will continue to buy the same types. Nevertheless, it is very apparent that the 1934 type will eventually eclipse the older type, and will immediately sell in much greater volume.

In this or previous mail you have received a copy of bulletin 500 and an initial supply for sales purposes. Note that it gives a complete detailed disclosure; nothing needs to be minimized as every detail is a cardinal selling point. You will also note that the materials used in construction are the very best obtainable regardless of cost. Instead of supplying but one worm and one worm gear for each gear reduction change, this type comes with one worm and two worm gears with each gear reduction ratio. This primarily is so that the Assembly 63 & 64 may be fixed in proper position so no bearing adjustments are necessary, but it also actually gives the customer one extra worm gear with Model 81 and two extra with Model 126. It will be about 30 days before triple gear reduction assembly can be supplied with 126. In the mean time it will be found that the double gears will handle lead and tin very

(Testimony of Harry B. Rice.)

satisfactorily but not in as great volume as specified with the triple gear. When the latter are completed they will be forwarded promptly to you or to any customers having purchased 126 guns in the meantime.

The price of the Model 81 Gun Unit is \$440 and Model 126 is \$495. (Note that Gun Units do not include Air Regulators). The price of Air Regulators is \$16. The price of oxygen and acetylene Regulators with 3 20' lengths of hose is \$56. Therefore the price of Model 81 Outfits is \$512, and of Model 126 Outfits is \$567. The prices of \$16 for the Air Regulator and \$56 for the two gas regulators and hose are the established national selling prices of these items by their manufacturers. The Air Regulator is a standard type but with a special size of valve orifice for our guns and therefore must be ordered specially direct from the factory at Chicago. To date we have invariably had trouble or failed to get the best results when the new type gun was operated without this regulator to control fluctuations and keep the pressure at 80 lbs. At least for the present sell Air Regulators with all 1934 guns. Naturally best results will be obtained by selling Outfits complete but if customers have good regulators and use the proper size of hose we have no objections to their buying the Gun Unit and Air Regulator only. The discount or commission on Gun

(Testimony of Harry B. Rice.)

Units is 33-1/3%; on regulators of all types and hose, 25%. The various codes have tightened up trade discounts on regulators and hose to the extent that on this basis less than 10% gross is realized by us for handling. Except to insure that our guns are used only in conjunction with satisfactory accessories, we would prefer not handling these items at all.

Note that Model 81 Outfit at \$512 compared to competitive prices of \$500 per outfit is actually \$4 less since competitors do not supply an air regulator at the \$500 price. You need not hesitate to put the 81 into any competitive situation, especially to old competitive users, as it will spray as fine and in larger volume than any competitive gun. Although the nozzle and combustion chamber of the 1934 type is similar to the 1933 type, a few small changes have been made and a finer spray from each of the new models is the result.

About 75% of the Manual of Instructions has been changed. Manuals will hereafter include the eight page confidential mimeo report applying to bulletin 351, and we believe you will agree the new Manual is more complete in all essential details, giving the purchaser the most practical information available to date.

At least for the present the recent prices on Models 80, 125, and 186S Guns of \$375, \$425, and

(Testimony of Harry B. Rice.)

\$475 will be maintained. Regulators and hose will be \$56 instead of \$50, making Outfits on these Models (without Air Regulators, of course) sell for \$431, \$481, and \$531 respectively. Although this is a raise of \$6 per outfit it is necessary to conform with 1934 accessory prices. A reasonable stock of 1933 models is available. We suggest that these models be offered where price is the paramount consideration. We have a few used models on hand that have been completely rebuilt and bear new guarantees which are available at lower prices as long as they last. None of these were sold and taken back but were used for demonstrating purposes locally.

It is probable that present users of 1933 models will immediately request a trade in allowance on the new models. We can make no provision for taking in either our 1933 model guns or competitive guns on the purchase of the new 1934 models. The margins are much smaller because the cost of manufacture is higher, and the sale prices are lower than the original prices of the older type guns. When absolutely necessary to do so, try to arrange a local trade in on the basis of reselling the old gun. In such cases we may have something to offer or be able to co-operate in disposing of the old gun. Of course, if a customer user of an old type is satisfied and is not in a position to buy another gun it would be poor policy to bring the new type to his

(Testimony of Harry B. Rice.)

attention as it might only cause a desire that could not be fulfilled, and therefore dissatisfaction with his present gun.

We expect to be able to forward parts price lists during the current month and we plan to have these based upon and similar to the gun prices and discounts. We are confident, however, that fewer parts will be sold and practically no gears or worms at all. One of our shop guns has been in almost continuous use for four months and we can detect no wear whatever on the gears. This is not only due to the enclosed type of lubrication, but to the larger size of gears and worms, and particularly to the use of specially hardened and polished worms.

Our competitors are emphasizing process promotion and give the prospect very little if any information relative to their guns, for good and sufficient reasons. We believe proper gun design is paramount, and having by far the best gun we disclose it fully. Now that you have something that will undoubtedly back you up in every issue we suggest a call on every competitive user in your territory and that you place special emphasis on the clear cut superior features of this gun. We have ample stock and can fill all orders on one day notice.

In demonstrating the new models we suggest using zinc, aluminum and bronze, all of which for short demonstration purposes, may be sprayed very satisfactorily with the single gear reduction because of the fact that the turbine has more power and flex-

(Testimony of Harry B. Rice.)

ibility. Of course steel may also be demonstrated but with any gun it spreads more, while bronze alloys and most other metals show a narrow small diameter spray stream that makes a better impression.

We will appreciate your comments and suggestions concerning this set-up and gun, and would like to learn of your prospective program at your earliest convenience. If you will get this product before your prospects with energy and dispatch we are confident your sales in 1934 will increase many times over the past year.

Yours very truly,

METAL SPRAY COMPANY

H. B. RICE,

Mgr.

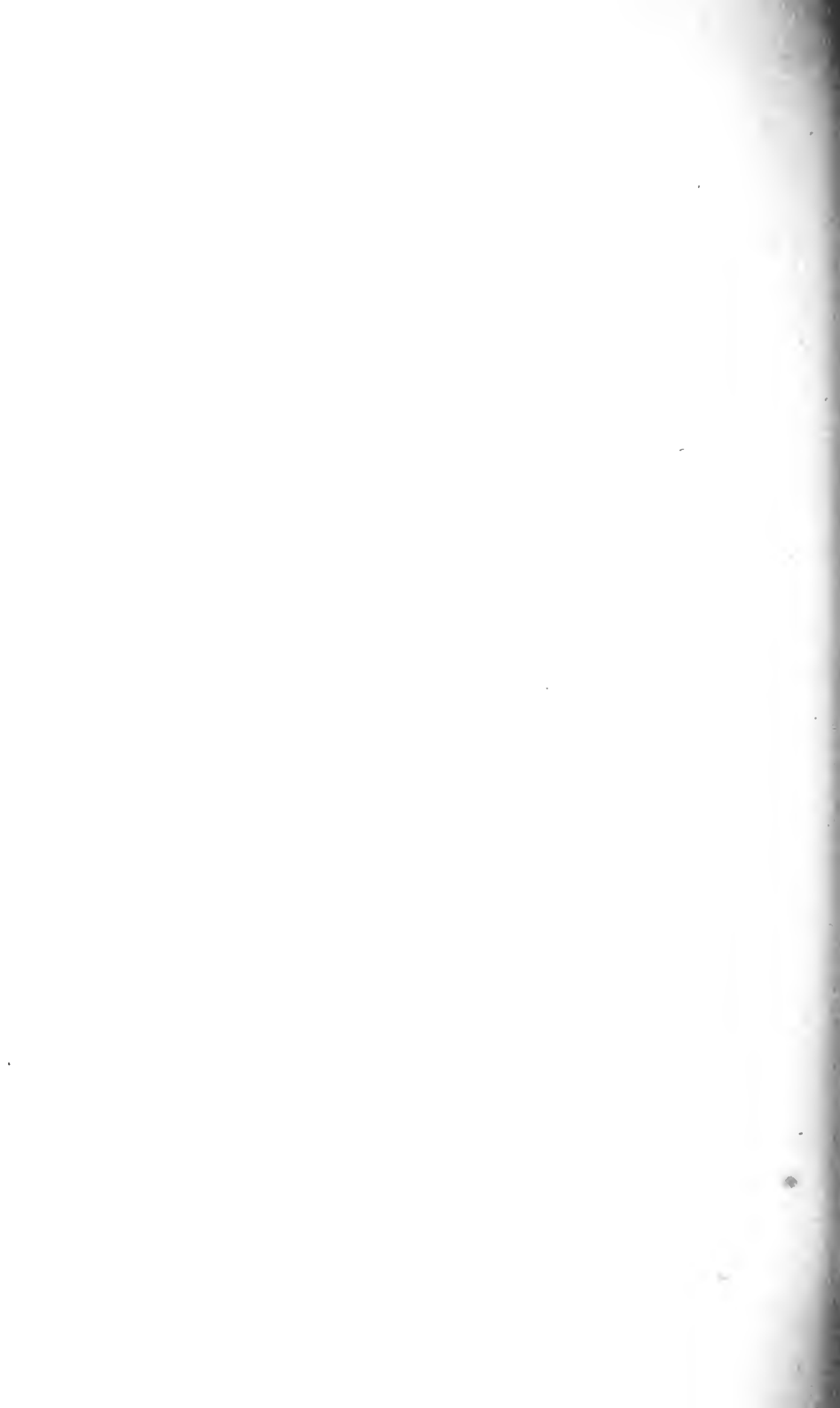
HBR/md

Mr. Britton—

Under another cover by air mail am sending essential pages of the Manual. The complete Manual is going forward by regular mail.

H. B. R.

[Endorsed]: No. 201-J Civil Lensch vs. Metallizing Co. Defts Exhibit No. M Filed 5-2-40 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk.



METAL SPRAY COMPANY

has developed and now offers
AN ENTIRELY NEW TYPE OF

METALSPRAY

GUN

the spraying of all metals in molten form to resist corrosion, replace wear, and perform the many thousands of applications now accepted as good practice.

THE NEW METALSPRAY GUN

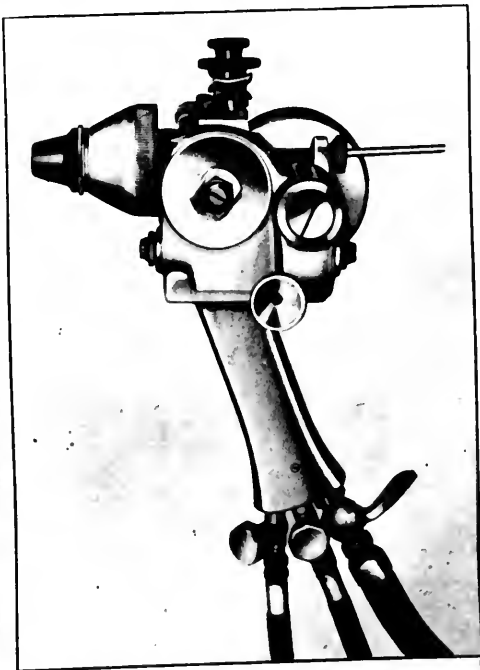
lighter in weight, easier to operate, requires far less maintenance, is perfectly balanced, and is built to meet the demands of a rapidly growing process.

progress of an industry
greater than the progress
development of its tools.

first Metalspray product
and completed from former
er, lowered costs, opened
ge new fields, and its
were quickly approved
any satisfied users. The
us that made the first gun
ess are retained, but ex-
ce and research have per-
at the addition of improve-
that are easily recognized
ential, yet are entirely new
nique.

one interested in metal
ang will take the time to
cfully the detailed speci-
e given in the following
and the reasons there-
The best tool in this
is unquestionably the
and proper selection
is certainly the bigges
for success or failure.

is bulletin covers
specifications only.
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ulletin 351.



Patented Sept. 23, 1930. Other Patents Pending.
THE METALSPRAY GUN
IN TWO SIZES, MODELS 81 and 126

In view of the fact that metal spraying devices have air turbine speeds varying from 15,000 to 50,000 R.P.M., worm gear reductions varying from 400-to-1 to 1200-to-1, must feed wire metals varying from soft lead to hard steel at accurate and uniform speeds into the oxy-acetylene flames, which in turn must melt the metal without oxydizing, so that the air blast surrounding the combustion nozzle may pick up the liquid metal, atomize finely and instantly impact the molten metal particles onto the surface to be coated at nozzle velocities as high as 40,000 feet per minute; it is obvious that such a tool is called upon to perform a delicate, finely synchronized operation, and to do so efficiently, continuously and economically it must be constructed of the very best materials. Each item must be designed with a full understanding of its important function, and all departments must be combined into a compact, light weight hand tool that will perform accurately under all field and shop conditions.

No. 301-1-Curt
Lensch
VS.
Metallizing Co
P.O. Box 15
No. 15 for ident
Marked for ident 524
R. S. ZIMMERMAN, Clerk
By J. B. Z
Dated





SPRAYING CAPACITIES

TWO SIZES OF GUNS

DEL 81 sprays all metals in 12 gauge Brown & Sharpe (.081" approx.). It has a smaller turbine, gear nozzle, etc., than Model 126 and weighs but 3½ lbs. Spraying capacity is large for the size of wire used, but, of course, not as economical for heavy deposits on the parts as the larger gun. Model 81 produces a very fine spray and probably a more dense deposit than any other hand gun now on the market. All metals to be used may be used in coils or reels.

[illegible]

		Lead and Tin	Zinc	Alum- inum	Promer Brom	All Types of Steel and Monel
Pounds Sprayed Per Hour	Model 81 Gun	75	14	4	6	2
	Model 124 Gun	40	22	7	11	6
Square Feet Coated 101" Thick Per Hour	Model 81 Gun	280	210	240	180	73
	Model 124 Gun	500	160	420	275	180

* obviously an operator cannot cover such large areas in one hour. The unit of 0.01" is given for estimating only thicker coatings are necessary for most practical purposes. Judge and spraying losses are not included as they vary with the object sprayed.

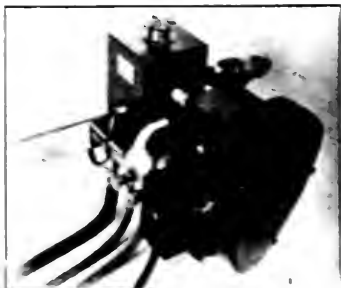
The figures shown are average, not maximum. Under ideal conditions, these volumes have been exceeded over 25%. Note that pounds of metal deposited per hour is the basis used. Estimates based on "coats" are inaccurate, as the thickness of a coat varies directly with the speed of oscillation of the gun and, therefore, with the method of the operator. Thickness of deposits for useful purposes range from 1/1000 of an inch to one inch (0.001" to 1.000"). Amounts to apply for various purposes are outlined in other literature and in the Manual of Instructions. Thicknesses desired are obtained by first learning the weight of the spraying metal per square foot from any plate or sheet catalog, or engineering handbook, and weighing out sufficient wire to obtain the specified thickness, based on the area to be coated. Allowance must be made for spraying losses as specified for the various metals in the Manual, as well as edge losses determined by estimate and based on the form and size of the object to be sprayed. An experienced operator will obtain 90% uniformity of thickness by hand operation and probably 99% uniformity when the gun is attached to the tool rest of a lathe in spraying shafting, or in other semi-automatic spraying operations.

AIR COMPRESSORS, REGULATORS—Mecletray guns require air at 80 lb. pressure and from 56 to 72 cubic feet per minute volume, depending on the size of gun and the media applied. It is most important that the volume be sufficient and that the pressure does not vary over the point. A special type of air regulator has been developed for these requirements and the regulator should be used with Mecletray Guns at all times.

For general applications, an air compressor of a minimum actual delivery of 100 ft³ per minute at 100 psi pressure should be used. This is actually larger than necessary for gun operations but is larger than necessary for proper mold blow fast. Moldspray guns do not require special air supplies or line sizes but if the air carries excessive amounts of oil or any other dirt, spots should be installed in the line to assist in condensing and removing same since this becomes the end blasted surface to be sprayed may become contaminated and the bond injured. The Moldspray air may appear regardless of excessive amounts of oil or water in the air.



Using Bruner in Master Design with
Model 81 Gun.



Example of Special Built Gun for Special Purpose

WIDE RANGE OF APPLICATIONS AND GUNS



With the aid of the Manual of Instructions, any average mechanic can learn to operate Metalspray guns within a few hours, figure costs and develop applications. Metalspray users receive full co-operation in developing any particular application, based upon wide experience and data accumulated from thousands of successful jobs performed by Metalspray and by Metalspray users in many large industrial plants. Bulletin 351 gives detailed data on some of the approved and accepted applications.



Model 126 Attached to Tool Rest of Lathe, Spraying $\frac{1}{8}$ " Dia. Monel on Shaft to Increase Diameter

Metalspray Gun UNITS Include:

- 1—Metalspray Gun, Model 81 or 126 (specify either model—see page three for detail specs.) with 3 Air Caps, extra Worms and Gears, 3 Wrenches, 1 large tube Lubricant, 1 Lathe Attachment, 1 Lighter, Hose Connections, Manual of Instructions and hardwood Box Container. (Shipping wt. 15 lbs.)

It is quite essential that a special air regulator of Metalspray design be used with the above unit, to control fluctuations and pressures and obtain the proper volume of air. This specification is—

- 1—Special Type Air Regulator with line gauge. (Shipping wt. 7 lbs.)

Quotations are made on Metalspray Gun Units and Air Regulators separately.

Metalspray OUTFITS Include

- 1—Metalspray Gun, Model 81 or 126 (specify either model—see page three for detail specs.) with 3 Air Caps, extra Worms and Gears, 3 Wrenches, 1 large tube Lubricant, 1 Lathe Attachment, 1 Lighter, Hose Connections, Manual of Instructions and hardwood Box Container.
 - 1—Special Type Air Regulator with line gauge.
 - 1—Two stage, Two Gauge Oxygen Regulator with adaptor.
 - 1—Two Gauge Acetylene Regulator with adaptor.
 - 2—20 ft. lgths. 3 16" dia. Oxygen and Acetylene Hose.
 - 1—20 ft. lgth. 3 8" dia. Air Hose.
- (Total shipping weight 45 lbs.)

Concerning regulator and hose requirements and purposes, refer to detail specs. on page three.

In addition to a Metalspray outfit, a user will require air supply of volume and pressure previously specified, pressure type sand blast equipment, sharp, angular silica sand (or steel grit) of from 16 to 30 screen size, oxygen, acetylene and metals in wire form of size specified for the model of gun desired. All of these items are readily available from local sources of supply or inquiry to Metalspray will bring detailed information as to sources, costs, and types best suited.

Write for detailed information advising fully as to the class of work to be performed. Your inquiry will have the immediate attention of experienced engineers.

METAL SPRAY COMPANY

MANUFACTURERS

METALSPRAY GUNS

SERVICE

11 LEWELLYN STREET

LOS ANGELES, CALIFORNIA



(Testimony of Harry B. Rice.)

Q. By Mr. Litzenberg: Mr. Rice, just one or two more questions. In regard to this machine and when it was completed, the one from which you made the circulars, when did you say that machine was practically completed, ready for demonstration?

A. In December, 1933, or January, 1934.

Q. Did you display that machine to anybody in its finished form? A. Yes, sir.

Q. To whom?

Mr. Huebner: Just a minute. I object to this line of examination. It is going out in another direction, your Honor, outside of the scope of his bill of particulars as stated in the record.

Mr. Litzenberg: It is simply to show he took this same machine to San Francisco and exhibited it to this agent.

The Court: I will allow it to be answered and an exception may show.

Q. By Mr. Litzenberg: To whom was the gun displayed?

A. The DeLaval Pacific Company.

Q. Where are they located?

A. In San Francisco.

Q. About what time was that?

A. I will have to refresh my memory.

Q. From what? [230]

A. From the letters in the file. I displayed the gun to Mr. George Stoddard on the Friday preceding February 19, 1934.

(Testimony of Harry B. Rice.)

Q. That was one of the completed guns?

A. Yes, sir.

Q. Do you recall whether you exhibited it to anyone else?

A. I might have but I don't think so at that time. Was that your question?

Q. Yes. Was the gun offered for sale then?

Mr. Huebner: That is objected to as calling for a conclusion of the witness.

Mr. Litzenberg: He knows. He was the salesman.

Mr. Huebner: Ask him what was done.

The Court: Just tell what was done.

A. The gun was displayed to Mr. Stoddard in order to aid in convincing him that he should cancel his distributing agency at that time so I could give the distribution to other parties, showing—or I should particularize. The question of the cancellation involved my taking back four old-style guns at their cost. And the purpose of displaying the gun was to convince the distributor that they might not be able to sell the four old-style guns prior to a general announcement of the new gun.

Mr. Huebner: I move to strike the testimony of the witness on the ground it is not responsive to the question. [231] He is only, as I understand it, permitted to state what occurred and not his conclusions or observations or general purposes.

The Court: I think that is correct. What was done, is the point.

(Testimony of Harry B. Rice.)

Mr. Litzenberg: The witness has simply explained that in connection with exhibiting the gun.

The Court: I wouldn't go too deeply into his reasoning on it. What was done? If a question arises as to the plausibility of that, then he may give reasons.

Q. By Mr. Litzenberg: Was that agency established? A. Which agency?

Q. With this San Francisco concern.

A. The new agency was established.

Q. At that time? A. Yes, sir.

Q. And that was in what month?

A. That was in February, 1934.

Q. Do you know whether or not that gun had been patented, this new gun that you were now exhibiting?

A. I know it had not been patented.

Q. How do you happen to know that it had not been patented?

A. I was informed by Lensch and Leder that their patent attorney at that time had not considered the features of sufficient uniqueness to obtain a patent; that only mechanical [232] skill and ingenuity was involved.

Q. Did you raise the question at any time with anybody in regard to a patent application?

A. On this gun?

Q. Yes. Or did anybody raise the question with you in regard to patenting it?

A. Later on Mr. Martin did.

(Testimony of Harry B. Rice.)

Q. Will you tell just what took place?

A. During the summer of 1935, Mr. Martin and I were negotiating to incorporate the Metal Spray Company and prior to that incorporation he examined the patent structure and mentioned to me on several occasions that the gun could still be patented or that a patent could still be applied for at that time.

Q. When was that?

A. That was in the summer of 1935. He further discussed the matter in the fall of 1935.

Q. Was anything done, to your knowledge, at that time? A. Not to my knowledge.

Q. That was in the fall of 1935?

A. Yes, sir.

Q. Do you know anything about any further steps in regard to the patent application?

A. The matter was discussed with me by Mr. Martin on several occasions, extending from the summer of 1935 up to the date of application. The question discussed was as to [233] the first sale or first onsale or first display of the gun or circular. I was asked repeatedly as to the time of first display of the gun or circular.

Q. Was the definite question raised as to the two-year period? A. Yes, sir.

Q. Who raised that?

A. I am not—by the question raised as to the two-year period, I assume that you mean the two-year period for application?

(Testimony of Harry B. Rice.)

Q. Prior to the filing of the application.

A. It was discussed on several occasions.

Q. Did you give any warning that the time was short?

A. During discussion in the summer and fall of 1935 I expressed myself as of the opinion that the application could safely be filed in December of 1935 or January of 1936. I was very much in doubt concerning the matter after that time.

Q. Do I understand that this machine was actually in use in the shop in March?

Mr. Huebner: Just a minute.

The Court: Yes. That is leading.

Mr. Litzenberg: That is right.

Q. By Mr. Litzenberg: Was your machine used in March? A. March of what year? [234]

Q. 1934.

A. It was used in the custom shop for tests for job work on a number of occasions in March, yes, sir.

Q. Was it used after that?

A. It was used after that.

Q. On regular job work? A. Yes, sir.

Q. Did it give satisfaction, so far as your knowledge goes? A. Yes, sir.

Mr. Litzenberg: I believe that is all. You may take the witness.

(Testimony of Harry B. Rice.)

Cross Examination

Q. By Mr. Huebner: Did you finally agree with Mr. Lensch and Mr. Leder that the gun, Plaintiffs' Exhibit 5, was probably patentable?

A. I didn't express any opinion as to its patentability in this letter.

Q. You knew, did you not, that Mr. Lensch and Mr. Leder did file the application which matured into the patent in suit? A. I did.

Q. And at the time they filed it you were affiliated with them, in a business way, weren't you?

A. Are you speaking of the gun that is in suit?

Q. Yes. [235]

A. At the time of filing the application—I think it was in April of 1936—the affiliation consisted of a distributing contract with the Metal Spray Company, Inc., of which Mr. Martin was president and I was vice-president. Is that responsive? I was not directly affiliated with them.

Q. At the time they filed the patent application in April of 1936, you were vice-president of the Metal Spray Company? A. That is right.

Q. And the Metal Spray Company was at that time, to your knowledge, a licensee from Lensch and Leder? A. That is right.

Q. Under their invention which was patented in the patent in suit? A. That is right.

Q. And you had full knowledge at that time, did you not, that the application was being filed and prosecuted?

(Testimony of Harry B. Rice.)

A. I understood it was being filed, yes.

Q. In fact you had quite a few conversations in regard to it, didn't you, conversations with Mr. Martin, the patent attorney? A. I did, yes.

Q. And you knew all about the progress of the application through the Patent Office?

A. I did. [236]

Q. And you knew when it was issued?

A. I did.

Q. You sold guns such as Plaintiffs' Exhibit 5, manufactured under the patent in suit, during the pendency of the application, didn't you, on behalf of the Metal Spray Company, the licensee?

A. I did.

Q. And you sold them after the patent was granted, didn't you? A. I did.

Q. You knew at the time you sold these guns, after the granting of the patent, that all the guns which went out of the shop were marked with the patent number 2,096,119, did you not?

A. Which patent is that?

Q. That is the patent in suit. A. I did.

Q. Did you send this letter, Defendants' Exhibit M, folded in an envelope in the usual way?

A. I won't say folded. I will say it might have been in a flat envelope. I sent it in an envelope.

Q. The letter bears creases indicating that it was folded at some time. When did that occur?

A. You mean the folding of the letter?

Q. Yes. When was the letter folded?

(Testimony of Harry B. Rice.)

A. I can't say. [237]

Q. In whose possession has that letter been?

A. Apparently——

Q. Has it been in your possession?

A. During what time?

Q. Well, how long was it in your possession, if ever?

A. This letter hasn't been in my possession since it was mailed originally.

Q. And you don't remember whether it was folded or not when it was mailed?

A. I do not.

Q. Did you personally mail it?

A. I might have.

Q. You are not sure?

A. I am not sure.

Q. Mr. Rice, did I understand you to testify that you copyrighted this Bulletin 500?

A. I did.

Q. In your own name? A. Yes, sir.

Q. How did you happen to copyright it in your own name instead of the name under which you were doing business?

A. It is frequently the custom, because the Metal Spray Company was merely a vehicle, my vehicle in distribution. The contract I had with Lensch and Leder was made out to me, gave me the distribution of the gun.

Q. Well, who printed that circular, that Bulletin 500? [238]

(Testimony of Harry B. Rice.)

A. I do not know for certain.

Q. Well, to the best of your recollection, who printed it?

A. I think the New Method Printing Company.

Q. Is that a Los Angeles concern?

A. A Los Angeles concern.

Q. Is it in business today?

A. I think so.

Q. Well, don't you know one way or the other?

A. I am reasonably certain they are in business.

[239]

Q. The New Method Printing Company?

A. Yes, sir, on Spring Street, I think.

Q. On Spring Street? A. Yes.

Q. Aren't you sure whether or not they printed that bulletin?

A. I am reasonably sure. We are looking back six years.

Q. You are willing to testify that that is the fact?

A. I would not testify positively. I say I am reasonably certain that the New Method Printing Company printed that circular.

Q. Who made the plates for the circular?

A. I am not certain.

Q. To the best of your recollection who made the plates?

A. They were either made by the New Method Printing Company or by a concern—I can't recall the name. I can find them. They are on North Broadway.

(Testimony of Harry B. Rice.)

Q. Some concern on North Broadway?

A. Yes.

Q. That is in Los Angeles? A. It is.

Q. Is that concern in business today?

A. I don't know.

Q. I would like you to reflect a moment, if you will, [240] and say whether or not you can state the name of that concern.

A. If I had—may I make a statement to you? I think I can obtain the name of the concern who made the cuts and the photographs.

Q. But at this moment you don't remember the name? A. I do not.

Q. Now, did you pay for these circulars, pay the printer for making these circulars?

A. Certainly.

Q. Bulletin 500, I am talking about.

A. Certainly.

Q. Do you remember how much you paid?

A. No, sir.

Q. Do you remember how many were run off?

A. I would hazard a guess that either 1,000 or 3,000.

Q. You are not sure which?

A. No—one, two or three thousand.

Q. Who personally placed the order for the printing? A. I did.

Q. Did you personally pay for the printing?

A. Yes, sir.

Q. Did you make payment by check or cash?

(Testimony of Harry B. Rice.)

A. Pardon me. May I correct that? I personally paid for it under the name of the Metal Spray Company. I signed the check. [241]

Q. You mean you gave the printer a check over the signature of the Metal Spray Company by yourself? A. Yes, sir.

Q. What was the amount of that check?

A. That I can't say for certain.

Q. Well, what approximately, as best you can recollect, was the amount?

A. The cost of printing circulars of this type in those days was between \$30 and \$50 per thousand, printing alone.

Q. What is your statement, then, as to the amount which these circulars cost?

A. \$30 to \$50 a thousand.

Q. Can't you fix that amount with more certainty? A. I cannot.

Q. What was the date of the check which you gave in payment of those circulars?

A. I can't say. My records, you know, I don't have them.

Q. Did you have any other work done by the New Method Printing Company after you had this run of circulars, Bulletin 500?

Mr. Litzenberg: We object to that as immaterial.

The Court: It is simply to fix the time.

The Witness: The question?

(Question read by the reporter.) [242]

A. I think so.

(Testimony of Harry B. Rice.)

Q. By Mr. Huebner: How long afterwards?

A. Well, say within the next six months, during the next six months. And I had some prior.

Q. Within six months or subsequent to six months after the run of Bulletin 500?

A. Within six months.

Q. Yes. Was it within six months or subsequent to six months?

A. I would say that I had another circular printed within six months prior to this circular.

Q. Six months prior?

A. A process circular, a circular covering process.

Q. Did you pay for the preceding job?

A. I did.

Q. By cash or check?

A. Undoubtedly by check.

Q. And what was the date of that check?

A. I am not certain.

Q. What was the amount of that check?

A. I can produce some checks, if you wish.

Q. I am asking you, trying to test your recollection and ascertain further particulars of these transactions. If you have checks with you that will establish any of these facts, you may produce them.

A. There was some \$200 spent for circulars in December [243] of 1933, but that was a process circular.

Q. And that didn't have anything to do with Bulletin 500?

A. Nothing whatever.

(Testimony of Harry B. Rice.)

Q. Now, did you pay that \$200 bill prior to placing the order for Bulletin 500?

A. I did.

Q. Did you owe them any money between the time you paid that \$200 bill and the date upon which you owed them for Bulletin 500?

A. Did I pay—I want to get that question again.
(Question read by the reporter.)

A. I can't say.

Q. You can't say whether there was any balance outstanding which you owed them?

A. I can't say.

Q. Was it your custom to pay cash or obtain credit from that company?

A. Usually cash, and sometimes credit.

Q. How much credit were you allowed?

A. In this specific instance, the New Method Printing?

Q. Yes.

A. His custom was cash, but frequently he carried the bills for 60 or 90 days, 30, 60 or 90 days.

Q. In the case of Bulletin 500 did you pay on a cash basis or obtain credit? [244]

A. That I couldn't say. My records are lost.

Q. What is your best recollection about it? Did you pay cash or did you obtain credit?

A. I think I obtained credit.

Q. About how much?

A. I don't know—between \$30 and \$50 per thousand for the circulars.

(Testimony of Harry B. Rice.)

Q. But how long after the job was done did you pay for it? A. I do not know.

Q. What is your best recollection?

A. I think within 60 or 90 days. I don't know.

Q. That is the nearest that you can fix it?

A. That is correct.

Q. And you are quite sure you didn't pay cash?

A. I don't think I paid cash.

Q. But you might have?

A. Yes, I might have.

Q. There seems to be, from your answers, some slight doubt as to whether the New Method Printing Company did print the first run of Bulletin 500. Is there any real doubt?

A. Yes, because it was shortly after this period that I changed printers. A printer by the name of Arthur Royal on Fourth Street, on East Fourth Street, he did several——

Q. You had him do some work later? [245]

A. I had several jobs.

Q. Is he still in business?

A. I think he is. I haven't checked that.

Q. Now, has this conversation enabled you in any way to recall the name of the engraver or company which made the plates for Bulletin 500?

A. No. But I have the name of the photographer.

Q. All right. Who was he?

A. Carrol Photo Company.

Q. Is that a Los Angeles concern?

(Testimony of Harry B. Rice.)

A. Yes, that is. He used to be on Pico Boulevard.

Q. Is he still in business?

A. I think so.

Q. In Los Angeles?

A. Yes, sir. I think he made the photographs. I could verify it by checking his records.

Q. Your best recollection is at the moment that the Carrol Photo Company of Los Angeles did make the photographs from which the cuts were reproduced in Bulletin 500?

A. Yes, sir.

Q. Who paid for the photographs?

A. I did.

Q. By cash or check?

A. By check.

Q. How much?

A. I think I have that check. I assume that this is [246] the one. I think that this check covers the circumstance you refer to, for \$29.25. It is dated April 6th. Is that the Carrol Photo?

Q. This is to the Hicks Company.

A. Oh, that is for the mimeographs.

Q. Then that isn't the check you wanted to produce, is it?

A. No. This is the check, for \$26.15.

Q. This check dated June 28, 1934, to Carrol Photo, for \$26.15, signed Metal Spray Company, by H. B. Rice, Manager?

A. Yes.

Q. That is the check which you gave in payment for the photographs from which the cuts in Bulletin 500 were made?

(Testimony of Harry B. Rice.)

A. That is my recollection.

Q. Now coming back again for a moment, does this help you in any way to recollect the name of the engraver who made the plates for Bulletin 500?

A. You might try the Acosta. I think there is such a firm. He made a batch of cuts for me. He is on North Broadway.

Q. Is he still in business?

A. I have no—I don't know. That is a name that I remember. Whether he made this one batch of cuts or not I don't know. [247]

Q. Have you any way, Mr. Rice, of identifying that particular copy of Bulletin 500, Exhibit 15, as the particular copy which you say you sent to Mr. Britton?

A. No, sir. Yes, I have. Well, wait. It is a duplicate of several thousand.

Q. Well, I would like you to state whether you have any way of identifying the particular copy which is in evidence as the copy which you say you sent to Mr. Britton.

A. No, there is no method of doing that. I have no way of identifying it.

Q. But you had, you say, from 1,000 to 3,000 of these struck off? A. Yes, sir.

Q. On what date did you—I am anticipating, and maybe I shouldn't do it. Did you register this Bulletin 500 with the Copyright Office?

A. I did.

(Testimony of Harry B. Rice.)

Q. On what date did you deposit copies of Bulletin 500 in the Copyright Office?

A. You mean the approximate date?

Q. I want the exact date.

A. That would be impossible for me to tell you. I don't have the copyright record.

Q. As near as you can recall, then, upon what date did you deposit copies in the Copyright Office?

A. I would say within 10 days of the printing, which [248] would place it at April 10th or 15th.

Mr. Litzenberg: What year?

A. Of 1934.

Q. By Mr. Huebner: When did you execute the affidavit accompanying the application for registration of this copyright?

A. The same answer. Of the copyright?

Q. Yes. A. The same answer.

Q. What is that?

A. The previous answer.

Q. Well, will you state it, please?

A. This is according to custom that I have used on other circulars, and I have no way of determining whether it was within 10 days of the final printing of the circular or not in this particular case. My custom was, within 10 days of the time that I got the two first circulars off the press, to do that, and on that basis I would estimate that I applied for copyright between April—it might have been as early as April 5th—April 5th and April 15th, 1934.

(Testimony of Harry B. Rice.)

Q. Was it your regular custom to send copies off to the Copyright Office within 10 days after printing?

A. That was my usual custom.

Q. Do you think you did that here?

A. I wouldn't be certain.

Q. Do you think you probably did? [249]

A. It was my usual custom, but there were sometimes exceptions. One gets careless sometimes.

Q. You actually paid for that printing job with a check dated June 28, 1934, didn't you?

A. I may have. You mean the New Method Printing Company?

Q. Yes. You have got that check in your possession today, haven't you? A. I may have.

Q. Let us see it.

A. I have a check of that type in my possession. Here is a check made out to New Method Printing Company.

Q. This check which you have produced is dated June 28, 1934, payable to the New Method Printing Company, in the sum of \$30, signed Metal Spray Company, by H. B. Rice, Manager. Did you execute and deliver that check to the payee on or about the date which it bears? A. I assume so.

Q. It bears an endorsement on the back, Fourth and Spring Street Branch, Bank of America, paid June 30, 1934. Is that the date the bank paid it?

A. That is the endorsement on the back of the check.

(Testimony of Harry B. Rice.)

Q. The check was paid on the 30th of June, 1934, wasn't it?

A. According to the endorsement on the back.

Q. And the cancellation stamp? [250]

A. Correct.

Q. What was that in payment of? That was in payment of this job of Bulletin 500, wasn't it?

A. That I don't know. The records are incomplete.

Q. You and Mr. Lensch and Mr. Leder have had some differences, haven't you?

A. On occasion, yes.

Q. Mr. Lensch and Mr. Leder have called you an embezzler, haven't they?

Mr. Litzenberg: We object to that, your Honor.

The Court: Just to show bias, and for that purpose only.

A. I heard one report to that effect.

Q. And they have also called you a thief, haven't they?

A. I didn't hear that.

Q. Didn't they call you that in your own presence?

A. Oh, I don't think so.

Q. They have called you other names that were not complimentary, haven't they?

A. Oh, that is correct, yes, sir, frequently.

Q. Isn't it a fact that you arranged or were a party to the issuance of stock of the Metal Spray Company to Lensch and Leder in settlement of

(Testimony of Harry B. Rice.)

moneys which they claim that you embezzled from them?

A. Oh, no, no, sir, not at that time, no, sir. Moneys which were owed by the corporation, Martin and myself, [251] royalties.

Q. I am not asking you to convict yourself, but I am saying that they accused you of embezzling money, and it was that money which they accused you of embezzling that you satisfied by having stock issued to them; isn't that a fact?

A. Absolutely not. That was a legitimate royalty debt.

Q. I am asking you if it isn't a fact that they accused you, and that it was in relation to that identical transaction that you allowed or caused stock to be issued to them in payment of that?

A. Never at any time did they accuse me of taking money which belonged to them, which was satisfied by a stock issue, no, sir.

Q. The corporation owed them quite a sum of money in unpaid royalties, didn't it?

A. That is true.

Q. During the time that you were an officer of the corporation?

A. That is true.

Q. And in lieu of settlement in cash the corporation issued stock to Lensch and Leder, and it was during the time you were an officer, isn't that true?

A. The corporation didn't issue the stock, or, rather, it was a transfer of stock.

(Testimony of Harry B. Rice.)

Q. You gave up some of your stock? [252]

A. And Mr. Martin too.

Q. You had been running this company, the Metal Spray Company, the fictitious firm, prior to incorporation, hadn't you? A. Yes, sir.

Q. And then you became the vice-president when the concern was incorporated; is that right?

A. That is right.

Q. And how long did you continue to be a vice-president?

A. Until my resignation in May, 1938.

Q. Your resignation occurred about the same time as this issuance of stock or division of stock, between you and Mr. Martin, with Lensch and Leder, didn't it?

A. No. I think the issue of stock was prior to that by several months.

Q. You expressed dissatisfaction, however, over that arrangement, didn't you?

A. I expressed dissatisfaction with the set-up of the firm at the time.

Q. And you quit the firm? A. I did.

Q. That is, you quit the corporation?

A. I did.

Q. And went over to work for the defendant corporation, the Metallizing Company of America, didn't you? A. Some time later, yes. [253]

Q. How much later?

A. A matter of weeks, I imagine.

(Testimony of Harry B. Rice.)

Q. It was only about a week or two weeks at the outside, wasn't it?

A. No. I wasn't active in the Metal Spray Company after April 1st. I was not active in the management or control of the Metal Spray Company. I did not join the Metallizing Company until, I think it was, about June or June 15th of that year.

Q. What year? A. Of 1938, I think.

Q. You have been with them ever since, haven't you? A. I have.

Q. And you are with them today?

A. I am, yes.

Q. You still hold some stock, don't you, in the Metal Spray Company? A. I do.

Q. And you have been trying to sell that stock, haven't you?

A. I would like to dispose of it.

Q. And you have made several efforts to sell it?

A. Only two or three.

Q. But you have made two or three efforts to sell it, to sell the stock, haven't you?

A. I have attempted to dispose of it. [254]

Q. And you have not been able to do so?

A. No, sir.

Q. One of the persons to whom you attempted to sell that stock is Walter Anderson, is it not?

A. Well, I think he solicited me first.

Q. Now, be sure of that.

(Testimony of Harry B. Rice.)

A. I think so. It was a telephone conversation.

Q. Why didn't you sell it to him?

A. He was going to negotiate for the sale of it. I don't think he was going to buy it himself.

Q. And you have approached a man named Ernest B. Berry and asked him to buy it, haven't you?

A. I did.

Q. And he wouldn't buy it, would he?

A. He did not.

Q. Has the Metal Spray Company, of which you are a stockholder, ever paid any dividends?

A. Not to my knowledge. I have had nothing to do with it recently.

Q. You have not received any dividends, have you?

A. No, I have not received any dividends.

Q. At the time that the royalties were accruing in favor of Lensch and Leder for their invention of the patent, you had a drawing account of \$250 a month, didn't you?

A. I think approximately.

Q. And you were running the company, I understand you [255] to say?

A. Not all the time. During 1937 and following up to—well, when the stockholders meeting was, in the spring of 1938—I was, well, yes, I was manager, vice-president and manager. But prior to 1937 there was a more or less dual control by Mr. Martin and myself.

(Testimony of Harry B. Rice.)

Q. During that period there were royalties accruing in favor of Lensch and Leder, which remained unpaid? A. Yes, sir.

Q. And during that period you drew your \$250 a month, didn't you? A. I undoubtedly did.

Q. In addition to your \$250 a month, you drew commissions in preference to paying Lensch and Leder their royalties, didn't you?

A. I drew, under the terms of a contract executed by the corporation, and appearing——

The Court: Haven't you gone far enough——

The Witness: ——in the minutes——

The Court: ——to show feeling or bias?

Mr. Huebner: Very well, your Honor. I appreciate that.

The Witness: Did I finish my answer?

Mr. Huebner: I am not going to pursue that further.

Q. By Mr. Huebner: Did you receive an answer to this letter, Exhibit M? [256]

A. I can't say. All the records are in the hands of the Metal Spray Company. I turned them over to them. I have no records of the correspondence.

Q. Where did you get these letters that you referred to on direct examination, purporting to be sent to people in San Francisco?

A. The only thing I took with me when I left the Metal Spray Company was the file marked "Rice, Personal." I found those in that file a few days ago in my garage, among personal files. There

(Testimony of Harry B. Rice.)

were very few records there, but among them were part of the DeLaval files.

Q. Where did you get the checks which you have produced today?

A. Fortunately I had all of my old canceled checks, dating back that far.

Q. Well, those checks are a part of the Metal Spray Company fictitious firm files, aren't they?

A. They were. I assume they were.

Q. Mr. Rice, is this your signature?

A. I would say so.

Q. You are quite sure of it, aren't you?

A. Yes.

Mr. Huebner: I will show it to counsel. [257]

Q. By Mr. Huebner: You mentioned showing a gun to Mr. George Stoddard. Is he living?

A. I think he is but I believe he is in New York.

Q. Rather than to put a complete letter in evidence, I am going to read a paragraph from a letter and ask you whether you wrote it. This purports to be a letter dated December 23, 1937.

Mr. Litzenberg: It seems to me, if your Honor please, the letter ought to be submitted to the witness for identification.

Mr. Huebner: That is all right.

The Court: He is entitled to examine it.

Mr. Huebner: I was going to show it to him.

The Court: Call his attention to the part you expect to examine him about, unless he wants to read it all to get the context. You have the privi-

(Testimony of Harry B. Rice.)

lege of reading it all if it is necessary to get the context in mind. Otherwise, the paragraph will be sufficient.

A. Is this the paragraph you referred to?

Q. By Mr. Huebner: Yes, sir.

A. Yes; I wrote this letter.

Mr. Huebner: I don't want to put the whole letter in evidence unless defendants' counsel wishes. Therefore, I will read a paragraph into the record as part of a letter dated December 23, 1937, on the letterhead of the Metal Spray Company, Incorporated, signed "Metal Spray Company, [258] Inc., H. B. Rice, Vice President", addressed to Mr. K. D. Falk, 2150 West Windsor Avenue, Ravenswood Station, Chicago, Illinois. This is the quoted paragraph: "I am going to add another piece of confidential news: During October, through Mr. Martin's efforts, we obtained a patent which we believe protects our unique design against infringement to such an extent that we can adjudicate it fully in the courts, if necessary, against two or three of our competitors, particularly one whom I do not need to name to you. Our expansion program would provide for the handling of this matter to our fullest advantage."

Q. Did you write that quoted paragraph to Mr. Falk on or about December 23, 1937, and mail the letter to him on or about that date?

A. In connection with sales information; yes.

(Testimony of Harry B. Rice.)

Q. And what patent were you referring to in that quoted paragraph?

A. I was referring, I assume, to this patent.

Q. The patent in suit? A. Yes.

Mr. Litzenberg: I call attention to the fact that it says "design". Is there anything in that or was there any design patent, unique design, as that paragraph says? A. No.

Q. By Mr. Huebner: That is a salesman's expression, isn't it? [259]

A. Unique design; yes.

Q. And at that date, December 23, 1937, you were a vice president of the Metal Spray Company, Incorporated, were you not? A. Correct.

Mr. Huebner: That is all.

Mr. Litzenberg: That is all. Now, if we might call Mr. Britton, I think in a very few minutes we can finish with him. [260]

WILLIAM M. BRITTON,

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: What is your name?

A. William M. Britton.

Direct Examination

Q. By Mr. Litzenberg: What is your business, Mr. Britton?

A. I am manufacturing metal spray guns.

(Testimony of William M. Britton.)

Q. In what location? A. In Los Angeles.

Q. How long have you been in the metal spray business?

A. I have been connected with metal spraying since 1933.

Q. And what was your business prior to that?

A. I was engaged in various lines of work, in sales work and in engineering.

Q. You are an engineer?

A. Yes, sir.

Q. I understand that you were also a major in the United States Army in the last war?

A. Yes, sir; I was.

Q. Did you at any time have an agency for a Metalspray gun? A. Yes, sir. [261]

Q. Where was this?

A. I was an agent for the Metalspray gun while I was in Detroit.

Q. While you were in Detroit? A. Yes.

Q. About when was that?

A. That was beginning in the fall of 1933.

Q. And with whom did you do business?

A. With the Metal Spray Company of Los Angeles.

Q. With any particular individual?

A. Mr. H. B. Rice was the sales manager.

Q. He was the sales manager at that time?

A. Yes.

Q. And your correspondence was with him?

A. Yes, sir.

(Testimony of William M. Britton.)

Q. I will hand you a carbon copy of a letter, dated April 5, 1934, which has been introduced in evidence, which is addressed to all distributors and agents, and will ask you to inspect that letter and state whether or not you have ever seen that before.

A. I wouldn't be able to say, sir.

Q. Whether you have ever seen that letter before?

A. No, sir.

Q. Did you not receive that letter in the mail from Mr. Rice?

A. I wouldn't know, sir.

[262]

Q. Did you not give that letter to Mr. Boyden?

Mr. Huebner: Just a minute, your Honor. This is counsel's own witness and he is leading him.

Mr. Litzenberg: I beg your pardon.

A. I want to explain that I see nothing on this circular letter to identify it in any way. It is a carbon copy of a circular letter which was sent to all distributors. I have no way of knowing that this particular letter was ever in my hands.

Q. Do you know whether you ever received such a letter or not?

A. Yes: I did receive such a letter.

Q. Did you not give this particular letter to Mr. Boyden?

A. I have no way of knowing because, as I say, there is nothing on this letter to distinguish it from maybe many other letters of the same kind which were sent to other distributors.

(Testimony of William M. Britton.)

Q. By the Court: What did you give Mr. Boyden?

A. I gave Mr. Boyden circular letters similar to this.

Q. How many?

A. One circular letter to Mr. Boyden.

Q. By Mr. Litzenberg: Will you look at the note at the end of that letter in longhand and tell to whom that is addressed?

A. Yes. It says—or that is a distinguishing mark. [263] It says, “Mr. Britton: Under another cover, by airmail, am sending essential pages of the manual. The complete manual is going forward by regular mail”. That does identify it as the circular letter which I received.

Q. Then you would change your statement, would you? A. I would; yes.

Q. Did you receive the circular attached to it? Will you inspect the circular that is attached to it and state whether or not you received that circular?

A. I received a similar circular from the Metal Spray Company.

Q. Did you give this circular with the letter to Mr. Boyden?

A. I have no means of knowing that.

Q. But you did give him a circular along with the letter?

A. I gave him a circular along with the letter; yes, sir.

(Testimony of William M. Britton.)

Q. Do you have any reason to believe that this was not the circular that you gave to him with the letter?

A. I have no means of knowing that it is not.

Q. It is quite possible it is the circular?

A. Yes.

Q. And that you received that from Mr. Rice along with the letter?

A. From Mr. Rice; yes. I received a number of [264] circulars of this type from Mr. Rice.

Q. Do you know Mr. Rice's handwriting?

A. I wouldn't be able to identify it; no.

Q. Would you say that that is his handwriting at the end of the letter that you have just read?

A. I wouldn't be able to identify his handwriting.

Q. Do you know his signature?

The Court: His signature; his name and initials only.

A. He has signed this circular "H. B. Rice". I don't remember his signature. So that I would not be able to offer any additional evidence other than the letter or the circular itself. I don't remember his signature personally.

Q. By Mr. Litzenberg: Was it customary for you to receive letters from Mr. Rice?

A. Oh, yes.

Q. Which were signed by him in person?

A. Oh, yes.

(Testimony of William M. Britton.)

Q. And yet you say you are not positive this is his signature?

A. That is several years ago and I don't remember his signature. I don't remember how it looked.

Q. But there is no reason for you to doubt that that is his signature, is there?

A. Oh, no; there is no reason for me to doubt it but I don't know it of my own knowledge.

Q. Do you remember about what time such a letter was [265] received by you?

A. It was received in the spring of 1934 as I remember.

Q. Do you remember whether you made any reply or not? Was it customary to reply to letters of this kind?

A. I don't remember whether any reply was made to this or not.

Q. Did you ever receive and sell any of the guns referred to?

A. I received one of the guns; yes, sir.

Q. Do you recall about when that was?

A. That was in the spring of 1934.

Q. One of the guns as shown on this circular?

A. One of the guns as shown on this circular; yes, sir.

Q. Did you sell the gun or did you use it for a sample?

A. No; I didn't sell it. It was turned over to the agent in Detroit who succeeded me.

Q. Who succeeded you? A. Yes.

(Testimony of William M. Britton.)

Q. And that was in the spring of 1934?

A. I don't remember just when it was turned over to him.

Q. But you received it in the spring of 1934?

A. Yes, sir.

Mr. Litzenberg: That is all. [266]

Cross Examination

Q. By Mr. Huebner: Mr. Britton, you are engaged in business in Los Angeles, selling metal spray guns, are you? A. Yes, sir.

Q. In competition with the Metal Spray Company?

A. And in competition with the Metallizing Company. They are both competitors of mine.

Q. How long have you been engaged in this business here? A. In Detroit?

Q. No; in Los Angeles.

A. I moved here in about the middle of December, 1939.

Q. Do you, by any chance, recall in what kind of an envelope this letter, Exhibit No. 5, was received?

A. No; I have no recollection of that.

Q. Do you remember whether the letter was folded as might be indicated by the creases on the letter? A. I have no recollection of that.

Q. Would you kindly state to the court where the letter has been since you received it?

A. It has been in my files.

Q. Well, did you personally fold the letter?

(Testimony of William M. Britton.)

A. It is probable that I folded the letter and put it in my pocket.

Q. You are not sure, then, whether you folded it or whether it was received in a folded condition?

A. I am not sure on that point. It might have been [267] in my brief case or it might have been in my pocket. I have no definite recollection on that point.

Q. Did you keep the Bulletin 500 and the letter together after you received them?

A. I am not sure whether this circular was kept with it or not. I am not sure as to that.

Q. Are you sure whether or not this circular is the particular copy that you did receive?

A. No. It is one of many circulars which I received from the Metal Spray Company.

Mr. Huebner: That is all.

Mr. Litzenberg: That is all, Mr. Britton.

The Court: It is about adjourning time, gentlemen. How many more witnesses have you?

Mr. Litzenberg: We have only one other witness but I don't think it is necessary to present her. It is the lady who had to do with the publication of that. It is immaterial and has no bearing.

The Court: And how many in rebuttal?

Mr. Huebner: Two, your Honor, I think will be all.

The Court: It will take about how long or can you estimate that?

(Testimony of William M. Britton.)

Mr. Huebner: So far as we are concerned, we should easily finish in the morning or possibly it won't take half a day.

The Court: Very well; 10:00 o'clock in the morning. [268]

Mr. Huebner: Are you through, Mr. Litzenberg? Are you resting?

Mr. Litzenberg: I would like to let that go until morning but I think so. I believe I have not introduced that French gun. I was just looking for it. I think it had better be put in evidence.

The Court: Let the clerk mark it.

The Clerk: Defendants' Exhibit N.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of Friday, May 3, 1940.) [269]

Los Angeles, California,
Friday, May 3, 1940, 10 A. M.

(Parties present as before.)

(Case called.)

The Court: Is that all, Mr. Litzenberg?

Mr. Litzenberg: No, if your Honor please. I want to bring to the court's attention a quotation in regard to the matter of evidence from Corpus Juris, section 1217, on page 973, which reads as follows:

“However, when parts of a document can be understood without the remainder, such parts

(Testimony of William M. Britton.)

may be used without offering the entire document in evidence, although, under such circumstances, the adverse party is entitled to introduce the remainder so far as it is relevant."

Then, that same thing is reflected in our own Code, Section 1854.

"When a part of a writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, the answer may be given, and when a detached writing is given in evidence, any other writing which is necessary to make it understood may also be given in evidence."

I just wanted to present that matter in support of our effort yesterday to introduce a circular which showed the drawings; and we only wanted it for the purpose of showing the drawings of the French patent. I refer to the Spanish *El Salvador* of February, 1933, which shows the same cuts [270] of the French machine which has been introduced in evidence. And it seemed to me that this document ought to be admitted, with the privilege of furnishing a translation of the circular. If the court would like to see it, there is a translation of the circular, or at least a portion of it. It is a regular publication, a magazine, printed in the Spanish language. The only thing that we claim, of course, is the fact that Mr. Boyden, having received these foreign circulars, saw those pictures in those early years.

(Testimony of William M. Britton.)

The Court: Do you want to do that to rebut any reference which may be drawn that it is not complete and that it is a copy?

Mr. Litzenberg: Yes; and to support his contention that he had the French machine and its disclosures brought to his attention at the time they were working on a new machine, and that his machine, the Mogul machine, is more in accord with the structure of this French machine than it is with the machine that is involved in the suit.

The Court: I see. I will allow nothing but the pictures for the present, for whatever you may argue from it; not the text.

Mr. Litzenberg: That is all that we care for.

The Court: And an exception may show if desired.

Mr. Huebner: If it please your Honor, may I look at it a moment?

The Court: Yes. [271]

Mr. Huebner: I construe the date, your Honor, to be a part of the text.

The Court: Yes.

The Clerk: That will be Defendants' Exhibit O.

Mr. Litzenberg: I would like to call Mr. Hicks for just a little testimony, to finish up a matter that was rather left yesterday uncompleted, which we found could be completed more definitely. [272]

GEORGE MONTGOMERY HICKS,

called as a witness in behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

. By Mr. Litzenberg: Please state your full name, your age and residence, Mr. Hicks.

A. George Montgomery Hicks; age 48; 615 South Street, Glendale.

Q. What is your business, Mr. Hicks?

A. Printing and letter service.

Q. How long have you been in that business?

A. About 17 years.

Q. Did you, in April of 1934, do any printing for the Metal Spray Company? A. I did.

Q. Do you recall what you printed for them?

A. Yes. I mimeographed some manuals, manual of instructions.

Q. Have you any evidence with you that would identify what you printed for them at that time?

A. I have the manual here that I printed.

Q. Will you present it? Just state what this is, Mr. Hicks, if you please. Just describe it.

A. Well, it is a manual of instructions which we mimeographed, I think 26 pages, and that is the title of it, [273] and down in the lower left-hand corner it says, "Copyright 1934, H. B. Rice."

Q. Where did this particular copy come from that you hold in your hand?

A. That is the copy that we saved for our own files.

(Testimony of George Montgomery Hicks.)

Q. Now, can you tell when this work was actually done, Mr. Hicks? A. Yes.

Q. Will you please refresh your memory in any way that you can and tell when this was printed?

A. It was completed and delivered on April 7th.

Q. What year? A. 1934.

Q. Do you recall what the bill was, that is, the cost? A. Yes, the price is here, \$29.25.

Q. \$29.25? A. Yes.

Q. I hand you a check which purports to be made out to the Hicks Company, and I will ask you to examine it and state if you know whether that is the check given to you in payment of that particular bill.

A. Yes, it is, and I recognize it also from the fact that the name, "The Hicks Company", is written in my own writing. I wrote that myself.

Q. The check was given to you and you filled in the—— A. That is right. [274]

Mr. Litzenberg: The date of this check is April 6, 1934, and this check, I think, yesterday was, by mistake, given by Mr. Rice, when he thought he was giving the Carrol Photo check, and afterwards I believe counsel referred to the Hicks check and the invoice, and for that reason we felt that we should present the thing and straighten it out this morning. I would like to offer this manual in evidence and have it marked, as the manual which was printed by the Hicks Printing Company in April of 1934, and which is referred to in the letter

(Testimony of George Montgomery Hicks.)

written by Mr. Rice to dealers, and which was introduced yesterday.

Mr. Huebner: That is objected to as irrelevant and immaterial. There seems to be no real need for encumbering the record with a 26-page document which has no materiality or relevancy to the issue.

Mr. Litzenberg: The manual does have materiality, because it is the manual which was sent out, having to do with the use and operation of the machine which was ready to go forth, and this is the manual referred to in the note written in long-hand by Mr. Rice at the foot of the letter which was sent to Mr. Britton. In other words, these manual sheets are the sheets therein referred to, coming from the man who printed them.

The Court: It may be filed and abstracted later, if necessary, or——

Mr. Litzenberg: It isn't necessary that it should be [275] copied or anything of that kind.

The Clerk: Defendants' Exhibit P.

Q. By Mr. Litzenberg: To what did you refer, Mr. Hicks, in order to get the date of this job?

A. Duplicate invoice.

Q. Duplicate invoice?

A. Which I kept for our files.

Q. And that gives you the date?

A. Yes, sir.

Q. And these came from your own records?

A. That is right.

(Testimony of George Montgomery Hicks.)

Q. And they have been in your possession all this time? A. Yes, sir.

Q. And it is your property?

A. That is right.

Q. That also appears in your journal?

A. Yes. I have an entry here in the journal, April 7, Metal Spray Company, \$29.25.

Q. And that identifies the job? A. Yes.

Mr. Litzenberg: You may take the witness.

[276]

Cross Examination

Q. By Mr. Huebner: Do you have any independent recollection of when this job was completed, Mr. Hicks?

A. Well, it is pretty hard to remember six years back.

Q. Are you able to tell us of your own knowledge and recollection that the job was completed on the 7th of April, 1934?

A. Yes; I have the record to that effect.

Q. But I want to know whether you recall that, or whether you are merely referring to the record and you find such an entry in the record. Which is it?

A. Well, obviously, in handling hundreds of jobs every year, I wouldn't be able to remember every particular job. I do remember the job. I don't remember exactly whether it was the 7th or the 9th, or just when it was. Naturally I don't after six years.

(Testimony of George Montgomery Hicks.)

Q. And you don't remember either the exact date on which the job was delivered to the customer, do you? A. No, naturally not.

Q. And your records that you have referred to do not indicate the date of delivery, do they?

A. Yes. We bill them on the day we deliver.

Q. But there is no entry, as such, showing delivery date, is there? A. No.

Q. Here is a check dated April 6, 1934, and you say [277] you believe you finished the job about the 7th or the 9th, or thereabouts?

A. No, I don't believe anything. My records indicate that it was finished on the 7th, delivered on the 7th.

Q. Then you required this customer to pay in advance for this work?

A. Not necessarily. He may have made the check out in advance. He may have called up and asked how much the price was to be and made out the check the previous day, and then when I delivered it on the 7th he presented the check.

Mr. Huebner: That is all.

Mr. Litzenberg: I think maybe we had better introduce this check, inasmuch as it has been testified to and identified.

The Court: Yes.

Mr. Litzenberg: I will ask to have it marked.

The Clerk: Defendants' Exhibit Q.

Mr. Huebner: May I ask just one other question, please?

(Testimony of George Montgomery Hicks.)

The Court: Yes.

Q. By Mr. Huebner: What character of work was this, Mr. Hicks, that you—was it mimeographing?

A. Mimeographing, yes.

Q. Did you have a separate stencil for each page of work? A. Yes, naturally. [278]

Q. You didn't run off any copies from a printing press? A. No.

Mr. Huebner: That is all.

Mr. Litzenberg: That is all, Mr. Hicks. I think that is all, if the court please.

The Court: Very well.

Mr. Huebner: Are you resting?

Mr. Litzenberg: Yes. [279]

Rebuttal

Mr. Huebner: Mr. Brown, will you please take the stand?

RALPH A. BROWN,

called as a witness in behalf of plaintiffs in rebuttal, being first duly sworn, testified as follows:

The Clerk: Please state your full name.

A. Ralph A. Brown.

Direct Examination

Q. By Mr. Huebner: What is your residence, Mr. Brown? A. 5522 Kennison.

(Testimony of Ralph A. Brown.)

Q. Los Angeles? A. Los Angeles.

Q. What is your business or occupation?

A. Printer.

Q. Under what name do you do business?

A. New Method Printing Company.

Q. Is that a corporation or is that a fictitious firm name? A. No—fictitious firm name.

Q. Are you the proprietor? A. Yes.

Q. Where is that located?

A. 442 South Spring. [280]

Q. How long have you been located at that address? A. Approximately ten years.

Q. And have you been doing business there all through this period? A. Yes.

Q. For the past ten years? A. Yes.

Q. Have you done any work for the Metal Spray Company? A. Yes.

Q. Do you recall doing any work for the Metal Spray Company during the first six months of 1934?

A. Well, yes.

Q. Directing your attention to Bulletin 500, which is a part of—well, it was Plaintiffs' Exhibit 15 for identification but it was offered in evidence by the defendants. It is Defendants' Exhibit M. Did you print that bulletin? A. Yes.

Q. At whose order? A. Mr. Rice's order.

Q. Did you at that time identify him with any company? A. The Metal Spray Company.

Q. Do you recall the date upon which you completed the first run of that Bulletin 500?

(Testimony of Ralph A. Brown.)

A. Well, I couldn't say the exact date it was completed. I have a record of when it was paid for, but I couldn't [281] give you the exact date it was completed.

Q. What date was it paid for?

A. On the 28th of April.

Q. The 28th of April?

A. Yes. I think it was April. Let me see. I will take a look. I have got the ledger sheet here with me. On the sixth and twenty-eighth. I think that is the first one. In fact I am sure it was.

Q. You mean the sixth month? A. Yes.

Q. That would be June 28th? A. Yes.

Q. What was the amount?

A. The amount was \$30.

Q. I will show you a check made to the New Method Printing Company, dated June 28, 1934, in the amount of \$30. Is that the check which was given you in payment of the account?

A. Yes. [282]

Q. Is that your endorsement on the back of the check? A. Yes.

Q. And the check was paid? A. Yes.

Q. On what date? A. On the 28th.

Q. That is, you received it on the 28th?

A. Yes; I received it on the 28th and it was put through the bank the next day, I think, or possibly the same day. It is usually the same day.

Q. Having refreshed your recollection by reference to the record as to the date of payment, are

(Testimony of Ralph A. Brown.)

you able to state approximately when the job had been completed?

A. Well, we gave Mr. Rice 30 days' time on that when we took the orders. I am not sure whether we gave him 30 days on the first order or not but later on we gave him 30 days. I am under the impression that the first order or two was paid for immediately after the job was finished.

Q. Well, was this one of the first one or two orders?

A. Yes; this was one of the first orders that was given to us.

Q. You have referred in your testimony in correcting the date of payment to June and not April, that is, June 28, 1934, to what record?

A. Well, it is our original entry or it is the first entry we make in our journal. I don't know what you would [283] call it, what kind of a book you would call it, but it is a loose leaf book in which we enter all of our cash received.

Q. Was that entry made in the general course of business? A. Yes.

Q. Under your direction or supervision?

A. I made it; yes.

Q. Does reference to that enable you to refresh your recollection with respect to the facts that you have testified to?

A. Yes. There is a journal that can be dug up if necessary but this shows it.

(Testimony of Ralph A. Brown.)

Mr. Huebner: I offer in evidence the check, dated June 28, 1934, identified by the witness.

The Court: It may be filed.

The Clerk: Plaintiffs' Exhibit No. 16.

Q. By Mr. Huebner: Would you say that it is true or not true—just a minute. I will strike that out. I have no further questions.

Cross Examination

Q. By Mr. Litzenberg: Mr. Brown, isn't it true that that loose leaf which you hold in your hand is a loose leaf from cash receipts? A. Yes.

[284]

Q. And that is all that is indicated thereon, so much cash received on that date from the Metal Spray Company? A. Yes.

Q. There is no identification of any job, is there?

A. No.

Q. And that indicates merely the date on which you received that amount of money?

A. That is right.

Q. You do not have in mind, so that you could state definitely, when that job was completed or when it was delivered?

A. Well, I could tell only in this way, that I know what the terms were that I gave him. Six years back you couldn't tell exactly to a day what it was.

Q. That is, assuming from the terms that the job was delivered somewhere near the time of the payment or 30 days before if you gave him credit?

(Testimony of Ralph A. Brown.)

A. Not over 30 days before. I am under the impression that the first time we did business with him that he paid cash for the order right promptly afterwards. The longer we did business the slower the payments came.

Q. May I ask in printing these circulars did you print different batches of the same circular?

A. There was usually a change but almost the same. There were usually some slight changes in them.

Q. But this circular here you identify? [285]

A. Yes; as one of the first we turned out.

Q. As one of the first you turned out?

A. Yes. We have other samples there.

Q. And it is marked "Copyright"?

A. Yes.

Q. You printed that on at the same time?

A. Yes.

Mr. Litzenberg: That is all.

Mr. Huebner: No further questions. Mr. Leder, will you take the stand again? [286]

PAUL LEDER,

a plaintiff herein, recalled as a witness on behalf of plaintiffs, testified as follows:

Direct Examination

Q. By Mr. Huebner: Mr. Leder, did you hear Mr. Rice testify yesterday? A. I did.

Q. Did you hear him say that he took a gun,

(Testimony of Paul Leder.)

a Metallizing gun, or, rather, a Spraygun, to San Francisco with him in February of 1934?

A. I did.

Q. How many guns, if any, had been completed by you or Mr. Lensch as early as February of 1934?

A. We had only one experimental gun.

Q. How long had you been developing that?

A. I started somewhere around in October of 1933.

Q. Did you have this experimental gun in condition to test or subject to tests during the month of February or was it later?

A. It was an experimental gun and tests had been conducted with it at the time.

Q. I didn't hear you.

A. Tests had been made with it at the time.

Q. In whose custody was that experimental gun?

A. In Lensch's and mine. [287]

Q. Did you ever allow Mr. Rice to take it out of the shop? A. No.

Q. To your knowledge, was that gun ever gone from the shop? A. No.

Q. Did you take any precaution to keep it safely there?

A. Well, the only people which had a key to the shop were Lensch and myself. Rice did not have a key to the shop. In other words, he couldn't have taken the gun at all unless by force and I don't think that happened.

Q. Did you keep a close watch on that gun?

(Testimony of Paul Leder.)

A. More or less, I did.

Q. So you would know whether it had been out of the shop during the month of February, 1934?

A. I think I would.

Q. And would you say that you know it was not out of the shop during that month?

A. It was not out of the shop.

Q. Did you have any knowledge of this gun being taken out of the shop by Mr. Rice and shown to anyone in San Francisco in February of 1934?

A. I did not.

Q. Did you at any time consent to Mr. Rice taking the gun out and showing it to anyone in San Francisco as early [288] as February, 1934?

A. I never gave my consent for him to take it out under any conditions.

Q. Are you able to say when the first gun was ready, or the first production gun was ready, for sale? Now I am talking about the guns made under the patent in suit.

Mr. Litzenberg: I think the witness testified on direct examination, giving the date when that gun was finished.

Mr. Huebner: He said that they were ready in May of 1934. I was just reestablishing that and going on from there.

A. May I get that question again?

Q. Yes. When were the first production guns completed and ready for delivery to customers?

(Testimony of Paul Leder.)

A. In the beginning or towards the middle of May.

Q. Of 1934? A. Of 1934.

Q. I direct your attention to the gun, Plaintiffs' Exhibit 14 for identification. Do you recognize that?

A. It was manufactured by myself and Lensch.

Q. And what designation did you give this gun?

A. Model 125.

Mr. Huebner: I offer in evidence the gun Model 125 which is Exhibit 14 for identification.

Q. Is this gun Model 125, or was it, I should say, manufactured under the Lensch and Leder patent No. 1,987,016, [289] granted January 8, 1935, a copy of which I show you? A. It was.

Q. On this particular specimen of gun, Mr. Leder, I notice what appears to be a weld on the shoulder of the pipe, which I am indicating. What is that and why is it there?

A. A backfire occurred in the gas passage and it was brazed up again to make the gun in good shape.

Q. Did the backfire blow clear through the shoulder?

A. It melted, or, as the gun passages unite at just about this point here, the hottest point of the backfire was here and the back pressure fused the metal backwards.

Q. And this weld or braze here was to repair the gun? A. That is right.

(Testimony of Paul Leder.)

Q. Do you happen to know, Mr. Leder, when the first gun made under the patent in suit was delivered to a customer and who it was?

A. The first gun was used by the Shell Oil Company in Long Beach. It was rented to the Shell Oil Company for one month.

Q. And when was the gun delivered to the company if you know?

A. It was shortly after the 17th of May.

Q. In what year? A. 1934.

Mr. Huebner: That is all. You may cross examine. [290]

Cross Examination

Q. By Mr. Litzenberg: Mr. Leder, what was Mr. Rice's relationship to you and Mr. Lensch? What was his connection with your firm?

A. Well, in 1931 or 1932 he applied for a job as a salesman and he started getting job work, metal spray work, for our shop, so that we could use our metalspray guns which we at that time made. And, naturally, they were very crude and so on. We were trying to make a metal spray gun and experimenting and so on.

Q. You and Mr. Lensch were manufacturing, furnishing the machinery and manufacturing the guns? A. That is right.

Q. And he was sort of a sales manager, getting out and getting business?

(Testimony of Paul Leder.)

A. Salesman; not sales manager. He talked himself into being the sales manager later on.

Q. He became the sales manager later on?

A. Yes.

Q. But his business was to sell the guns?

A. That is right. Well, no. We didn't manufacture them then. By the time he came into our business there, we didn't manufacture any guns for sale. We just did job work with the guns which were made by us. At that time we were not in a position to make guns for sale. We were more or less experimenting with them. [291]

Q. Did he collaborate with you in connection with your experimental work and in developing this new gun?

A. Well, he had apparently a certain amount of experience which he gathered at previous places of work where he was occupied before, like the Metallizing Company or the Metal Layer Company. I think he was connected with the Metal Layer Company of Philadelphia.

Q. You knew that he had experience in acetylene gas devices of various kinds, didn't you?

A. That is what he claimed. I never saw him handle any of the equipment.

Q. Did he ever handle any of your spray guns?

A. Not to my knowledge.

Q. Was he with you at the time the first work was being done on the gun that we are referring to, Model 126, the gun involved in this suit?

(Testimony of Paul Leder.)

A. Well, I believe that after I had just about everything doped out on there that I told him that I was going to make a gun which will run in oil, where the moving parts would run in oil, similar to a differential on an automobile, so that the gun will not need very much attention during operation and wouldn't need much cleaning and so on but just greases pumped into it and the gun can run for hundreds and hundreds of hours without being looked after.

Q. You say when you had things doped out. Did you [292] do most of the development work in connection with this machine?

A. Lensch and I did.

Q. Together? A. Yes.

Q. Did Mr. Rice offer any suggestions at all from his experience, not in the nature of an inventor but as a practical man?

A. After we had the gun going and so on, and as he was the salesman, he could more or less indicate what the trade wanted, in an endeavor to make it applicable to certain features which were to our advantage for sales.

Q. And it was his business to explain this gun to prospective customers and to explain its merits?

A. It was.

Q. And he was familiarizing himself with this construction so as to be able to explain it to customers? A. Yes.

(Testimony of Paul Leder.)

Q. But you and Mr. Lensch did the designing and manufacturing of the gun?

A. That is right.

Q. And so Mr. Rice would, naturally, have to have the gun in order to exhibit it to different customers, prospective customers?

A. That is right.

Q. Do you mean to say definitely that you never at any [293] time gave him this gun to show to any customer?

A. Not before we had the gun tested fairly well.

Q. Of course not. You wouldn't give it to him before it was finished but, after it was finished and ready for demonstration, would you say definitely that you did not give it to him to take out to exhibit to prospective purchasers?

A. No. After it was ready and finished and so on, we consented to let him take it out to customers or prospective customers for demonstration.

Q. And you permitted him to take it out and have it photographed in order to prepare the circulars for advertising?

A. That is right.

Q. And these circulars were made from this particular gun, the first gun that was made?

A. From what we call the experimental gun.

Q. Did you have any other guns in the process of manufacture about the same time that this gun was being completed?

A. The experimental gun was completed first.

(Testimony of Paul Leder.)

After we found out it was worth while going on with the manufacture, we did.

Q. Is it true or is it not true that you had something like 10 guns in the process of manufacture, that is, the various parts for them? [294]

A. No; not 10.

Q. How long after this first gun was completed did you make any other guns?

A. Do you mean started making them or finished? [295]

Q. That you started to manufacture other guns.

A. I would say it would have been about by the end of March or the beginning of April.

Q. Did you discard any models as not being satisfactory, before you finally arrived at the——

A. Yes, I did.

Q. You had to make patterns for making this gun? A. Yes.

Q. Did you use the same patterns for making the guns that you started to manufacture in March?

A. I have made a number of patterns, going through the different phases of development, and the patterns of the gun which was the experimental gun was slightly altered for the purpose of manufacturing the guns for sale.

Q. Just slight changes or modifications?

A. That is right.

Q. In the original patterns? A. Yes.

Q. Will you tell me, Mr. Leder, why you did not enclose these pipes leading from the combustion

(Testimony of Paul Leder.)

chamber to the nozzle, why they were not enclosed in a housing?

A. There was an aluminum sheet metal shield put on the first one, but back pressure of gases, accumulated gases, got in there, and it made it—well, it wasn't dangerous, but it kind of popped by lighting the gun, and we decided to take the shield away and leave it away. [296]

Q. I notice the frame or casting of this gun is cut away in the front so as to expose those feed wheels and the passing of the wire into the nozzle, and also in the rear it is all open. Is there an advantage to be able to use your gun and to see the wire passing through there?

A. Well, it would be an advantage to any gun to be able to see the wire going through there.

Q. And is it an advantage to have that structure a skeleton, showing it left open?

A. Not only that. It is also an advantage in reducing the weight of the tool, because the heavier the gun will be in the hand of an operator the quicker the operator will get tired and have to rest, but taking out every little bit of weight in the gun, it enables the operator to keep on operating a longer period of time.

Q. So that in addition to giving visibility from front and rear of the feed wheels you have a lighter machine?

A. Yes, that is right.

Mr. Litzenberg: I think that is all.

Mr. Huebner: That is all, Mr. Leder. Call Mr. Stokes. [297]

CHARLES L. STOKES,

called as a witness on behalf of plaintiffs in rebuttal, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Huebner: Will you please state your full name, Mr. Stokes?

A. Charles Lawrence Stokes.

Q. And your address?

A. 620 San Lorenzo Street, Santa Monica.

Q. Your present occupation or profession?

A. Engineer and patent solicitor.

Mr. Huebner: Mr. Litzenberg, do you wish to save the time of the court and stipulate that Mr. Stokes is a qualified patent expert, or shall I prove it?

Mr. Litzenberg: I think it would be well to ask a few questions, and he can state his qualifications in a short time.

Q. Mr. Huebner: In view of that, will you please outline your qualifications as a patent expert?

A. After receiving an earlier education at the University of California in civil engineering with the class of 1908, of which I am not a graduate, I went into mechanical engineering, and followed that in different lines, principally with the Holt Manufacturing Company at Stockton, California, and was commissioned in the last [298] war as an instructor in caterpillar engineering, as Captain of Ordnance, and later had charge of the Twelfth Division Motor Transport Repair Shops, repairing guns

(Testimony of Charles L. Stokes.)

and other war implements. After the war I was engaged in mechanical engineering in patent matters, with the General Motors Corporation. And at a later date I headed the patent department for Union Oil Company of California, and later again the Associated Oil Company of California. I was admitted to practice as a solicitor before the Patent Office in 1917, which I have followed to date.

Q. Have you previously testified as an expert witness in patent infringement suits?

A. I have.

Q. On how many occasions?

A. On several occasions, in this district and others.

Q. Have you read and are you familiar with the Lensch and Leder patent in suit? A. Yes.

Q. Have you read and are you familiar with all of the prior art patents which have been offered in evidence by the defendants? A. Yes.

Q. Have you examined and are you familiar with the construction and operation of the commercial gun manufactured and sold by the Metal Spray Company, Plaintiffs' Exhibit 5? [299]

A. Yes.

Q. Have you examined and are you familiar with the construction and operation of the defendants' Mogul gun, Plaintiffs' Exhibit 8?

A. Yes.

Q. Have you examined and are you familiar with the manufacture and operation of the Metal-

(Testimony of Charles L. Stokes.)

izer gun, Plaintiffs' Exhibit 6, the old Lensch and Leder gun, identified as Model 125, Plaintiffs' Exhibit 14, and the so-called French gun, Defendants' No. N? A. Yes.

Q. Will you please review to the court the prior art in evidence and point out what features, if any, are novel in the patent in suit over the prior art, and make a comparison of those features which you find to be novel, if any, with the defendants' Mogul gun? That question naturally contemplates a review of the patent in suit, in so far as it may be necessary to establish the disclosure for purposes of comparison.

A. I think for the sake of brevity I might refer to the enlarged drawings of the patent in suit first, and I might explain briefly what I understand the disclosures of the patent to be. The specification discloses a mechanical structure, which includes substantially three parts in operative relationship. They may be identified, if I have the court's permission to mark this drawing in [300] red, first, as a casing, comprising part of power unit 10. This casing carries on one side a gear cover 32a.

Mr. Litzenberg: If the court please, I am just wondering whether it is necessary for all of this detail description, when the patent is in simple language, is easily understood, and the drawings are clear. I do not believe even the court needs any further explanation of the construction exhibited in the patent and on those drawings. I just offer that objection, feeling that maybe——

(Testimony of Charles L. Stokes.)

The Court: I doubt that you need to go into great detail with this witness.

Mr. Huebner: That is not our intention. But in order to complete the record we will offer it. [301]

A. May I state again that the parts comprising the structure of the patent in suit are the casing, comprising the housing for a turbine, from which leads a train of gears to the other side of the casing which supports the transmission wheels for driving the shaft, and each end journaled in the faces of an open channel between the walls of the turbine housing and the gear case housing. These should be referred to as a power unit. There is a combustion unit, which is shown in Figures 7 and 8, comprising a burner head, supporting a nozzle, with passages for gas, such as acetylene and oxygen and air, and having control valves thereon, through a gas manifold, which is adapted to be fastened on the front end, and a power unit to be readily detached therefrom for repair or other purposes. Those are two of the features of the structure in combination. The third feature includes the wire feeding mechanism, which is stated to be placed in the open channel referred to between the faces of the turbine housing and the gear case housing, and comprise a driving knurled wheel similarly journaled in each side of the open channel, and an upper idler wheel, which is fixed onto a hinged latch, so that the upper wheel can be separated

(Testimony of Charles L. Stokes.)

from the lower wheel and prevent the feed of wire therethrough. The combination of these three primary structures, including the parts mentioned, is the cooperative assembly of the patent in suit. The details of the gear train and other [302] minor details are not substantially of great effect, because they can be replaced by equivalent mechanism. By this mechanism the patentees attain certain objects stated in the specification, so that in the first place, by having a detachable combustion unit, in the case of backfire or failure of the passages, as the patentees call it, or for any reason of damage, the combustion unit can be readily removed as a unit, for replacement or repair. The hinged latch construction is another object, in which they state that any desired pressure can be exerted on the wire feeding through the wheels, thereby better preventing slippage of the wire and effecting the uniformity of its feed. The construction of the power unit as such provides an open channel, with all the functions it is capable of performing.

To refer to the prior art in evidence: I will refer first to the Irons patent, U. S. Patent 1,917,523.

Q. Do you have the exhibit number of that, Mr. Stokes?

A. That is Defendants' Exhibit H. This Irons patent referred to is of what I will term hereafter the closed box type, and, with its enclosed feed mechanism, is known as the conventional type. That is stated in the patent, in the second column of page

(Testimony of Charles L. Stokes.)

1, lines 53 to 60. He says that is the conventional type, well known in the trade. To this conventional box type, containing the gears and the wire feed mechanism, there is a detachable gas head or [303] combustion head fixed. The Irons patent contains all its mechanism in the closed box, and is subject to all the defects there may be in this type, and specifically the Irons patent refers to backfiring, as stated on the first page, in the first paragraph, first column. The patent states that, due to the fact that backfiring occurs, that trouble occurs in the passages, and one of his objects is to eliminate by his structure such backfiring. This Irons patent is a closed box for all the mechanism, to which a detachable gas head is fixed which contains a nozzle and feed pipes and a control valve. It does not show in any place a housing for the gears, which is a separate part of the power unit, nor a turbine housing, as a separate part of that unit, having an open channel in which the wire feeding wheels are adapted to rotate. Nor does it show a hinged latch member adapted to be lifted up so that the wire can be fed through there while in operation of the gas.

I will refer next to the Valentine patent, Defendants' Exhibit G, No. 2,102,395. This patent shows a closed box type of wire feeding mechanism, which has a detachable head affixed thereto, with no power unit in the closed box portion. This patent describes the cover of the gears being fixed on

(Testimony of Charles L. Stokes.)

with bolts, and obviously, from the structure itself, the latch portion is not hinged so as to be lifted with the upper idler wheel, which it does not have, [304] and there is no open channel there in which the wire feeding wheels rotate to feed the wire. The drive mechanism is stated to be remote from the gears, going through a flexible conduit marked 2 in Figure 1.

I will refer next to the Schoop patent. Defendants' Exhibit I. No. 1,617,166. This patent is interesting from one standpoint, inasmuch as it is frequently referred to, in certain French patents to be later described, as improvements thereon. This Schoop patent discloses a container 1, in which there is no mechanism whatsoever for feeding wire. The object of this patentee is to provide a chamber filled with granulated material, metal or other material, which is agitated by a blast of combustible gas put into pipe 2, such as hydrogen, and is fed through a combustion unit or gas head into the chamber. This is a detachable combustion unit, fixed into an open chamber, to receive the supply of granulated metal, and that is all the feeding mechanism there is for material. It has no mechanism whatsoever associated therewith which is to be compared in any way with the patent in suit, but it does show a detachable nozzle or burner head.

I will refer next to the Morf patent. Defendants' Exhibit J. No. 1,128,175. A glance at this patent and the drawings thereof fails to disclose any ap-

(Testimony of Charles L. Stokes.)

paratus whatsoever. The patent is apparently an early one, directed to the method of spraying material, and shows no [305] apparatus, so I see no object in discussing it.

I will refer next to the Lensch and Leder patent, Defendants' Exhibit K, No. 1,987,016. This patent is referred to in the patent in suit, which they have made certain improvements over. The patent discloses a gear mechanism and turbine placed on one side of the gun. From the gear case there is a wire feeding wheel extending out, with a single bearing, and an upper wheel is adapted to be fixed on a spring on the cover of the gear case, so that when the gear case is closed the wheels will force the wire through the nozzle, and these wheels are simply placed exteriorly of the gear case, not in any channel at all. The combustion unit on this early Lensch and Leder apparatus is not readily detachable, and there is no adjustment whatsoever in the tensioning device for holding these wire wheels in engagement.

[306]

I will refer to British patent No. 440,248, Defendants' Exhibit E, which is of the closed box type, having a gear mechanism entirely enclosed in the box with the wire feeding mechanism. I would say from looking at this patent that it may or may not have a detachable combustion unit. It doesn't say anything about it in the specification but the drawing shows that perhaps the head could be detached. In any event, it is of the form of a closed box type like the Irons patent, for instance. And it

(Testimony of Charles L. Stokes.)

is obvious that in these closed box types any fines or dust from the wire being fed will collect and gum up the gears. That point, I may say, is especially well brought out in the first Lensch and Leder patent, Defendants' Exhibit K. This patent, though, is interesting again from the standpoint of all of these closed box type guns in that he provides also a means of preventing backfire damaging the closed box apparatus. I will quote the words here on page 2, lines 79 to 84. "This results in preventing the flame flashing back through the nozzle to the apparatus proper in consequence of access of air with a small flame or during ignition". And in the same column, line 116, "The dangerous backfiring of the flame to the interior of the pistol is also obviated". This patentee obviates this damage from backfiring, or states he does, by providing very small passages for his air feed.

I will refer to British patent No. 268,431, Defendants' [307] Exhibit F. This patent is also of the closed box type, in which the gears operate in a closed box and do not operate in any open channel with a rotate. The main object of this patentee was to provide a gear box and nozzle head distant from the driving mechanism. And he does not show a turbine associated in any way or the parts in accordance with the teachings of the patent. The patentee has on his gear box a hinged gear cover but it is on the side of the gear case and not associated with any spring-pressed mechanism shown on the

(Testimony of Charles L. Stokes.)

top of the case, which clearly is not hinged to be lifted up and expose the gear wheels.

I will refer to the French patent No. 741,740, which shows a framework supporting a train of gear wheels on the side, which are not housed. And through the main head of that body and not of the burner nozzle at all the air and gas passages pass, which gives it all the defects of the closed type of box, such as has been demonstrated in the Metallizer gun and in all the closed box types heretofore recited. There is an electric motor placed on the rear end of the frame, which the patentee states can be replaced by a distant drive. He does not have a detachable head forming a combustion unit such as is indicated by the patent in suit. The translation which I made with respect to the passages of air and gas states, "Air under pressure comes through a passage 24 set in the very body of the apparatus." And, of course, that is clearly shown in Figure 3 and [308] Figure 5.

Q. By Mr. Huebner: You are able to read and translate French, are you, Mr. Stokes?

A. Yes. I have to use a dictionary occasionally for vocabulary because I don't remember all of the words.

I will refer to French patent No. 680,554, Defendants' Exhibit C. This is the French patent which has been discussed in connection with the physical exhibit known as the French gun, I believe.

(Testimony of Charles L. Stokes.)

Q. Defendants' Exhibit N?

A. Defendants' Exhibit N. This patent, of course, is the closed box type, the disadvantages of which have been exemplified. With respect to the patent in suit, the disclosure of the patent, in the first place, does not indicate any orifice or vent in the top such as is shown in the model. It doesn't show a latch of any kind there. It does not show a channel, therefore, in the sense of the patent because, in any event, the bottom of the drawing in the French patent, as well as the model, of course, is entirely tight so that there is no channel there, for instance, which will permit the dropping down and elimination of dust and fines which would collect on the bottom in any case, whether there was a hole in the top or not. The bottom is still solid. However, this construction, of course, does not eliminate in the slightest the trouble from damage in the passages carrying air and gas to the [309] nozzle. These are placed in the front wall of the French patent and model and it is subject to the deterioration which the patent in suit states he wishes to avoid. It does not have a detachable combustion unit, described by the patentees. That these dangers existed from backfire and so forth in this French patent is very clearly illustrated because they provide not only one but two safety devices, illustrated in Figures 4 and 6, to take care of backfire damage by relieving the pressure. The translation I have made brings that out very clearly.

(Testimony of Charles L. Stokes.)

Figure 4, for instance, shows a passage, marked 27, for oxygen, which is joined to a passage 28 for acetylene, and these mixers go through baffles 29 which the patentee says are for the purpose of thoroughly mixing them. They then go into what he calls a safety chamber 32, which has a diaphragm or a disk which he says is of small strength so that it will be easily ruptured on a predetermined pressure. And from there it goes through the pipe 30 and the control valve shown in Figure 5 up to the passages marked in Figure 1, marked 12 and 13. One of those passages is for the mixture of gases as I have described and the other one is for air. Those passages are shown in Figure 1, as in the model, clearly in the box itself. I might just briefly refer to this in describing the safety device. "One of the objects of this invention is stated in the second paragraph, to diminish the risk of back-fire." He provides [310] a safety chamber disposed in the course of the gases, which carries a weak ruptured wall broken in case of backfire to prevent the burning gases from circulating into the combustible gas passages. The second safety arrangement is in Figure 6, which he states is in the acetylene gas line. And the operation of that is simple inasmuch as, normally, the gas would go up and by its pressure lift the valve or ball 36, let the gas go through and, when the valve is off of its seat, if there is a backfire, the pressure will reseal it and prevent the flame going past that ball. I

(Testimony of Charles L. Stokes.)

think that French patent in particular emphasizes the weaknesses and dangers and troubles evolved from this closed box type of guns because he thought it necessary to provide two safety devices.

I will turn to French patent No. 639,039, Defendants' Exhibit D. Both this patent and the one previously discussed are issued to the same patentees. And it will be noted that both of them refer to improvements in the Schoop type of gun, as illustrated in United States patent No. 1,617,166 that I have discussed. One of them, Defendants' Exhibit C, does not use the Schoop type of detachable combustion head. The type now under discussion, Defendants' Exhibit D, shows a combustible head which is detachable from a closed box type of gun. And, of course, this particular patent, in Figures 1 and 2, shows a reciprocating arrangement there for feeding wire and in Figure 5 shows a [311] turbine. In neither case are there gears or transmission machinery and in neither case are there any open spaces according to the patent in suit. In this patent, likewise, he finds it necessary to provide a safety arrangement for this so-called Schoop type of gun, and he provides a passage which is best seen in Figure 3 and identified by the number 32. The specification in my translation shows that that is what he calls a filter plate which, normally, is set so that the entering gases will be filtered to take out dust and other material, while, on the other hand, if there is a backfire, and I will quote the

(Testimony of Charles L. Stokes.)

patent briefly, he says, "to prevent backfiring into the gas passage, there is fixed on the gas supply tube shown in Figure 3 a filter plate 32 which a spring 33 constantly holds out from opening the orifice of tube 31. When a backfire occurs, the resulting pressure of this quickly applies the filter plate 32 upon the orifice of tube 31 and prevents penetration of the flames into the gas conduit".

I think that that concludes my observations on the prior art.

Q. The question contemplated or included, Mr. Stokes, as you probably recall, a request for a comparison of the features which you observed as new in the disclosure of the patent in suit with such features, if any, as you find in the defendants' Mogul gun.

A. The features of novelty that I have brought out in [312] combination as to the structure of the patent in suit may be observed by showing on the enlarged drawing of the accused gun the casing comprising a member or power unit on the rear, which supports a gear train, shown in the dotted lines of the lower Figure of Plaintiffs' Exhibit 9, corresponding exactly in their structure and mode of operation with the gun in suit, shown in Figure 2 of the patent. This power unit, as is readily seen, supports on each side a turbine housing in each case. On the opposite side of that member it has a gear case or housing and in the front portion is a detachable combustion unit in each case, carrying the

(Testimony of Charles L. Stokes.)

air and gas passages, which may be readily detached from the power unit. It is adapted to fit in each case on a shoulder in the front of that power unit so that wire being fed through there will be fed on a straight line from the rear to the back. And this straight line passes almost centrally through an open channel between the walls of the turbine housing and the gear housing and between wire feeding wheels rotatably fastened therein. These are shown in each case very clearly, the upper of the wire feeding wheels in each case being pivotally mounted on the upper part of the power unit and adjustably held under tension in position during operation so as to hold the upper wire feeding wheel in tension with the wire being driven by the lower wheel. The open channel functions to dissipate any backfire and in each case it extends right [313] through the power unit. I may point out in that connection, by referring to Plaintiffs' Exhibit No. 8, that the handle of this exhibit has a hole right through it. It is not simply a core in the handle. The hole extends right through to cooperate with the channel between the walls of the housings in the power unit and is available to relieve pressure and, secondly, to permit any dust or sprays access to the ground. This same structure is shown in Plaintiffs' Exhibit 8-A, which shows two holes in the bottom, for whatever purpose they may be there. The open channel in the plaintiffs' gun and in the defendants' gun permits the passage of any fines and that eliminates any wear

(Testimony of Charles L. Stokes.)

from fines on the wire feeding wheels. It would seem all of the elements are there in cooperative assembly in the defendants' gun which the patent describes.

Q. In the defendants' Mogul gun, when the upper wire feeding wheel is thrown back on its pivoted mounting, is the wire visible to the operator?

A. Yes.

Q. Does that feature enable the use of rough or irregular or oversized wire as described in Bulletin 500?

A. That permits the wire, if it is bent or out of shape, such as it may be curved in being taken from a roll, to be put into the front guide and centered, that is, visibly centered.

Q. In the defendants' gun, when the upper wire wheel [314] is in operative position, latched down, some point has been made that the wire is not wholly visible. Have you observed in the operation of that gun whether or not the wire is visible for practical purposes?

Mr. Litzenberg: The witness has not stated whether or not he ever saw the operation of the gun.

Mr. Huebner: All right.

Q. Mr. Stokes, have you witnessed the operation of a Mogul gun? A. Yes.

Q. Have you operated one yourself?

A. Yes.

Q. All right. Now, will you answer the question?

(Testimony of Charles L. Stokes.)

A. I have seen the wire feeding through the wheels during operation.

Q. By the Court: Do you have to turn that in order to do it?

A. Yes, your Honor. I had to look on the side or on the top. I could not see it from the back.

Q. By Mr. Huebner: Was it necessary to discontinue the spraying operation in order to obtain that visibility?

A. No: it was not. The spraying was going on during that time.

Q. It was just a case of looking around instead of looking from behind?

A. That is right. [315]

Mr. Huebner: Take the witness.

Cross Examination

Q. By Mr. Litzenberg: Mr. Stokes, you do not intend as an engineer to tell this court that you can take the Mogul gun in operation and can see the wire entering the feed wheels and emerging from the feed wheels while the machine is in operation, do you?

A. I have already told the court I could not see the wire entering the feed wheels.

Q. In other words, in the Mogul gun you can not see the wire entering the feed wheels or emerging from the feed wheels while the machine is in operation?

A. Yes: I think I can see it emerging from the feed wheels during operation.

(Testimony of Charles L. Stokes.)

Q. By getting down close to it and making a personal inspection? Can that be done while the machine is in operation?

A. My eyesight is just average. I could see it without any great effort.

Q. You don't mean to infer or to——

A. Excuse me. To finish my answer, may I have that piece of wire?

Q. Of course, I am talking now about the machine being in operation; not in demonstration, without the handle.

A. Yes. [316]

Mr. Huebner: Hold it so the court can see it.

A. I think my answer was fully responsive as to what I could see. I said I had to look on the side or on the top. I can see it without any great effort. I could see it in operation. [317]

Q. You did not mean to infer that this handle opened up or did not close the lower side of this channel, did you?

A. If something has a hole in it of that size, I would say it is not closed.

Q. But I mean, so far as vision is concerned, that hole is not in register with any eyesight point that you can see from the top of the machine?

A. I don't think I said anything about seeing through it.

Q. I am asking you. Is this hole in alignment with your vision line in front of the upper feed wheel, when the machine is in normal closed condition, not open?

(Testimony of Charles L. Stokes.)

A. Yes, I would say it is in alignment, about, with the feed wheel.

Q. Well, I think your eyesight is rather off.

The Court: I don't understand that the witness claims any advantage in the way of sight, but that it furnishes an outlet for dust and——

The Witness: Exactly, fine dust.

Mr. Huebner: Fines.

The Witness: Fines and dust.

Q. By Mr. Litzenberg: Not for giving light through the channel?

A. I never mentioned light.

Mr. Litzenberg: That matter was brought out and attention was called to this large drawing, and that day- [318] light could be seen through here, and that was emphasized, and I would call your Honor's attention to the fact that these drawings are about four times enlarged to the machine, and in this particular view the upper feed wheel is thrown back, and for that reason, on this enlarged view, you do not have the little streak of daylight that you can see through there, but when the machine, in its normal size, is ready for operation, you cannot see daylight through, and it was not intended, of course, that there should be daylight through.

Q. By Mr. Litzenberg: Now, Mr. Stokes, will you refer to the Morf patent, Defendants' Exhibit J, and tell just briefly what that teaches?

A. That teaches the feeding of a material, glass or other substances, in the form of a rod, to be sub-

(Testimony of Charles L. Stokes.)

ject to the action of a flame and a blast of air, so that it can be sprayed in finely divided form on metal.

Q. In other words, as early as February, 1915, Mr. Morf has clearly disclosed that a wire or material, when brought in register with the juncture of a gas blast and an air blast, can be vaporized or sprayed in vapor form onto a surface?

A. Without the use of any apparatus.

Q. Without the use of any apparatus?

A. Yes.

Q. Do you find power driven wire feeding members in [319] the Irons patent, Defendants' Exhibit H? A. In a closed box, yes.

Q. And you find a turbine mechanism for driving that power mechanism? A. Yes.

Q. And you find a yieldingly mounted upper feed wheel? A. Yes.

Q. For yieldingly holding the wire in contact between the two feed wheels?

A. Yes, but not hingedly attached, to be lifted out of the road.

Q. Wouldn't you say, referring to Figure 1, in the upper right-hand corner, that that drawing would illustrate or indicate a pivot? A. Yes.

Q. In view of the fact that in the upper left-hand corner there is a latch overlying the front edge of the cover?

A. Yes, but that is the cover of the box, the cover of the closed box.

(Testimony of Charles L. Stokes.)

Q. And the drawing would indicate that the upper feed wheel is pivotally connected to the under side of the cover, would it not? I am speaking now about the patent, this particular drawing.

A. That is right.

Q. And there is a spring bearing on the upper feed [320] wheel? A. That is right.

Q. So that it is yieldingly mounted and pivotally connected to the under side of the cover?

A. Yes; I would say that is true.

Q. And it has a combustion nozzle, that is indicated as being detachable? A. That is right.

Q. Referring to the Valentine patent, which is Defendants' Exhibit G, do you find power driven feed wheels for feeding the wire? A. Yes.

Q. And would you say that the upper feed wheel is yieldingly suspended to the cover of the box?

A. I would say it is yieldingly guided by the channel of the upper part of the box.

Q. Referring to Figure 2, does it not show two vertical coiled springs supporting the opposite ends of the shaft?

A. Those springs are not supporting it, in my opinion. They simply serve to put more tension on the wheel. I wouldn't say it was supported.

Q. I said suspended. A. Suspended——

Q. In other words, these springs exert a yielding action on the upper feed wheel?

A. That is right. [321]

(Testimony of Charles L. Stokes.)

Q. So that the wire is yieldingly held between the two? A. Yes.

Q. And there is a worm and gear drive for driving it? A. Yes.

Q. And there is a combustion nozzle?

A. Yes.

Q. And that combustion nozzle is detachable?

A. Yes.

Q. The worm is driven substantially by flexible shaft, indicated at Figure 2?

A. That is right.

Q. Referring to the Schoop patent, Defendants' Exhibit I, this mechanism is of a different type. The material used is not wire, but what?

A. I have already said, I think, that it is pulverized material of different kinds.

Q. And it is forced up into the passageway leading to the nozzle?

A. I see no mechanism of this patent at all that you refer to. There is no mechanism for doing anything in this patent.

Q. Are there not three gas tanks connected with the combustion nozzle, for furnishing the combustible gases?

A. Yes, but nothing for feeding the wire.

Q. Would you not say that the reference numeral 2 connected with the pipe at the bottom of the reservoir 1 [322] was a means for forcing this pulverized dust up through the passageway leading to the nozzle?

(Testimony of Charles L. Stokes.)

A. It is a means, but not a mechanism.

Q. In other words, this pulverized material is forced by air into a nozzle passageway, where it is subjected to the combustible gases?

A. That is right.

Q. Referring now to the Lensch first patent, Defendants' Exhibit K, this mechanism shows the feeding wheels wholly on the outside, I believe, of the power house? A. That is right.

Q. And the housing has a lid which closes down, and which lid also carries the upper feed wheel for the wire, or does it? A. That is right.

Q. And the drive mechanism is in the box, but the feed wheel is on the outside of the box, and is moved with the lid—when the lid is turned back, the knurled feed wheel 27 goes back with it?

A. That is right, yes.

Q. Referring to the British patent, Defendants' Exhibit F, we have here, I believe you said, a closed housing or box type?

A. That is right.

Q. In which the power mechanism is enclosed in the housing? [323] A. Yes.

Q. And the feed gears are in a housing at the side, through which the wire is fed?

A. No. That is the main head. There is no side chamber there at all. That is the main head.

Q. Would you not say there is a partition between the turbine and the gears which fed the wire?

A. I don't see any turbine there in the head at all.

(Testimony of Charles L. Stokes.)

Q. Do you not see it in the lower part of Figure 1?

A. Yes, but the object of that patent is to put that turbine away from the wire feeding head entirely. If you will look at that drawing you will see a broken line.

Q. But by having a partition between the turbine and the gears which drive it. Referring to French patent 741,740, Defendants' Exhibit B, I will ask you to refer to the drawings and state whether or not this drawing, Figure 1, does not show an open vertical channel or passageway through the body, in which are mounted the upper and lower feed wheels 12 and 14?

A. I think so. I think that would be indicated as a passageway.

Q. And the wire passing through these wheels into the nozzle? A. Yes.

Q. And it shows a combustion nozzle which is detachable? [324]

A. No, not without a pipe, no, it doesn't.

Q. Does it not show a nozzle which is detachable by screw connection?

A. Yes, but that nozzle does not carry any——

Q. I am just asking you whether or not——

A. Yes; they all carry nozzles.

Q. Which are detachable? A. Yes.

Q. This mechanism is driven by an electric motor? A. Yes.

Q. And by worm and gear?

(Testimony of Charles L. Stokes.)

A. That is right.

Q. In a separate chamber from that in which the feed wheels are located?

A. That is right, at the rear of the instrument.

[325]

Q. So that the wire is fed in alignment with the nozzle opening?

A. Yes, I think so.

Q. This Figure 4 would seem to show some baffle plates, or what correspond to baffle plates, in the nozzle, would it not? Would you interpret Figure 4 as showing a perforated plate?

A. I think, if I remember right, that is a distributing disk, adapted to register on one side with the air passages in one groove and with the gas in the other.

Q. And to function in breaking up or more thoroughly mixing the gas products?

A. I don't know that that is stated to be for that purpose at all. The translation says that Figure 5 shows in longitudinal view the assemblage of the distribution disk with the diffusion cones, and that is all that appears, two annular grooves, one for gas and one for air. I don't see any breaking up described there.

Q. Well, if gas products or combustible gases are forced through a plate having a series of perforations, isn't it true, from engineering knowledge, that those gases would be more thoroughly mixed?

A. Yes, if they went through there, they would be mixed a little better.

(Testimony of Charles L. Stokes.)

Q. Referring now to French patent 680,554, I will ask you to refer particularly to Figure 3—and this is the [326] French patent, I believe, that we have the physical exemplar of. Referring to Figure 3, as you look down—this, I believe, is a top plan view, with the cover removed. Is that correct?

A. That is right.

Q. And as you look down into this do you see a housing there for the transmission gears or for the driving gears?

A. Yes.

Q. And on the other side there is a separate housing for the turbine?

A. That is right.

Q. And between these two houses is an open space or channel?

A. There is a space there. It is not open.

Q. It is a channel?

A. It is a space. Let us put it that way.

Q. Well, there is sufficient space for the mounting of the feed wheel?

A. Yes, that is right.

Q. And the cover for the upper feed wheel is pivotally connected to the under side of it?

A. Yes.

Q. And there is a spring indication that the upper feed wheel is yieldingly held in place?

A. No, there is no spring shown in French patent No. [327] 680,554 referred to, nor do I see any in the physical exhibit that is supposed to correspond to the patent.

(Testimony of Charles L. Stokes.)

Q. By referring to the physical exhibit, however, and pressing on the upper wheel, do you not find a resiliency there? A. That is right.

Q. But you can not see the spring?

A. No.

Q. Because it is enclosed in the sleeve?

A. Yes, and it is not adjustable.

Q. But when you refer to the drawing it shows a pivoted lever on which the wheel 24 is mounted?

A. Yes.

Q. And there is an extension above the wheel, a yoke, over the upper feed wheel. Would you call that yoke corresponding with the yoke that is shown on the physical exhibit?

A. Oh, yes, I think that would be a fair representation.

Q. So that the upper feed wheel is pivotally and yieldingly held on the under side of this cover?

A. On the cover of the closed box; that is right.

Q. When you close this box there is no visibility to the wire? A. That is right.

Q. When you are feeding? [328]

A. That is right. And all the dust stays in the box; that is true.

Mr. Litzenberg: Which one is this?

Mr. Huebner: That is the Metallizer. You are referring to Exhibit 7?

Mr. Litzenberg: Yes.

Mr. Huebner: That is the drawing of the Metallizer gun.

(Testimony of Charles L. Stokes.)

Mr. Litzenberg: Does the court want to consider the question of adjournment? This is a pretty good time as far as I personally am concerned, to give me a little breathing spell on this.

The Court: 2:00 o'clock.

Mr. Huebner: May I inquire, your Honor, so that my schedule this afternoon can be worked out, whether there will be much more testimony on your part?

Mr. Litzenberg: No, I think no more testimony on our part.

Mr. Huebner: Well, then, we might even, your Honor, be able to—oh, it may take a half hour, so all right. 2:00 o'clock?

The Court: I am very willing to go on for half an hour, if that would conclude it?

Mr. Litzenberg: I think that would be unsafe.

The Court: Very well.

(Whereupon a recess was taken until 2:00 o'clock p. m. of this day, Friday, May 3, 1940.) [329]

Afternoon Session

2:00 o'clock

CHARLES L. STOKES

recalled.

Mr. Huebner: Mr. Litzenberg, have you any further questions?

Mr. Litzenberg: Yes.

Cross Examination

resumed

Q. By Mr. Litzenberg: Mr. Stokes, referring now to the French gun, Defendants' Exhibit N, I believe you would refer to that as a box type of gun? A. That is right.

Q. And referring now to the Mogul, would you call that a box type of gun?

A. No, for the reason that it has the open channel, which does not distinguish the French gun, open to the atmosphere, I mean.

Q. But in the general construction of the body, if you will notice on one side of the wall of the French gun there is a housing for the gears?

A. That is true.

Q. And on the opposite wall there is a housing for the turbine? A. That is true.

Q. And the chamber or space for the feed wheels is between the two housings in the box? [330]

A. That is true.

Q. And the lid carrying the upper feed wheel closes down so as to position the upper feed wheel

(Testimony of Charles L. Stokes.)

over the lower feed wheel? A. That is right.

Q. Now then, when we refer to the defendants' gun, you will find the housing for the gears on one side? A. Yes.

Q. And the housing for the turbine on the other side? A. Yes.

Q. With a space between for the lower feed wheel? A. Yes.

Q. And when the carrying lever or pivoted member or hinged member is brought over to bring the upper feed wheel into the chamber and into contact with the lower feed wheel, you have here the mechanical equivalent of the lid in the French gun?

The Court: Mechanical, he says. Note the limitation there.

A. I was forced to note that in answering. As far as the mechanical equivalent of having some means of lowering that upper wheel, yes, and I speak solely with respect to that feature. I might qualify that further by saying that in the French gun there is no adjustment for such contacting the wheels. It is simply a contact. There is no means for adjusting for different sized wires or different [331] kinds of wires.

Q. If I should say a pivoted member carrying the upper feed wheel, adapted to be closed upon the body of the device to bring the upper feed wheel into engagement with the lower feed wheel, would that be correct?

Mr. Huebner: In describing what?

(Testimony of Charles L. Stokes.)

Mr. Litzenberg: The Mogul gun, defendants'.

A. As I understand the question, as a single element, I think that might describe that latch on the Mogul gun.

Mr. Litzenberg: Will you read the question, please?

(Question read by the reporter.)

Mr. Litzenberg: Notice the language that I used.

Mr. Huebner: What do you mean by the body of the device?

Mr. Litzenberg: That is evident. It is the whole body, the casting.

A. That pivot is not closed on the body of the device. It is the contact——

Mr. Litzenberg: Will you read the question, again, please? You are an engineer, a mechanical engineer, and if you will listen to the language used, that is all I want you to answer.

(Question read by the reporter.)

A. No, because this member is not closed on the body of the device. It is closed on the wire feed wheel. It is not closed on the body of the device.

[332]

Q. It is closed down to bring the upper feed wheel into contact with the lower feed wheel, is it not?

A. That is right.

Q. And it is a pivoted member?

A. Yes.

Q. And hingedly mounted?

A. Yes, sir.

Q. And it carries the upper feed wheel?

(Testimony of Charles L. Stokes.)

A. That is right.

Q. Is that same language not true of this French gun? Does it not cover a pivoted member?

A. Yes.

Q. Or a hinged member? It carries the upper feed wheel?

A. That is right.

Q. And it would engage it so as to contact with the lower feed wheel when it was closed down?

A. With the wire between them.

Q. And it has means for yieldingly holding it in engagement with the lower feed wheel?

A. That is true, but they are not adjustable.

Q. Now, Mr. Stokes, referring to the French gun, I wish you would state, as I enumerate a number of elements, whether it is true of the French gun. This is a metal spray gun, is it not?

A. I would think so. [333]

Q. It has a power unit carrying a turbine?

A. Yes, it carries a turbine.

Q. It has transmission gears and wire feed wheels?

A. Yes.

Q. Said member including a housing for said turbine and gear?

A. I haven't heard anything about a member before this.

Q. Said member is the body of it.

A. It has a body.

Q. Which you could refer to as a body member.

A. I am trying to answer your definitions as clearly as I can. If you will give me the elements

(Testimony of Charles L. Stokes.)

in a sequence that will coordinate them, I think I can go faster.

Q. All right. Point out the housings for the turbines and the gears.

A. Here is the housing for the turbines, a housing inside the box, and comprising the outer cover for the gears.

Q. Point out the open channel in the walls exteriorly of the housing?

A. I don't see an open channel, in the sense of the patent, in this device.

Q. But is there not an open channel or open space between the housing——

A. There is a space, of course, to accommodate the gears. [334]

Q. And that is correctly referred to as a channel or chamber?

A. I would rather call it a space, in this position.

Q. But there is an open space between the two housings? A. That is true.

Q. And these feed wheels are adapted to be rotated in the channel or in the space?

A. Coming right specifically to that question, if that space extended the whole way, that would be right in it, or partly in it, yes.

Q. Is there a combustion unit comprising a member adapted to carry combustible gases and compressed air, connected with this machine?

A. There is a nozzle on this machine, which has

(Testimony of Charles L. Stokes.)

a combustion unit, which is not a combustion unit as I understand it; it is not detachable from the closed box.

Q. I am not asking whether it is detachable. But referring to the front of the box to which these tubes are connected, is that not a member adapted to carry combustible gases and compressed air?

A. The front of the box would be a member adapted to carry gases and air, correct.

Q. And having control valves?

A. If you include the pipes, yes, it has control valves.

Q. Is there a nozzle base on this box? [335]

A. There is a forwardly extending base on this box for an air nozzle, yes.

Q. And there is a metal spray and nozzle secured to said base and adapted to receive the gases and compressed air from the combustion unit?

A. Yes, on the forward part of the box.

Q. This claim calls for means including an abutment between the nozzle base and the walls of said member for releasably confining said units in operative association. Do you find such construction there?

A. No, I do not.

Q. What would you refer to as an abutment?

A. Well, an abutment is a shoulder.

Q. Where is the abutment on plaintiffs' gun?

A. There are three screws here, which I can take out, and the abutment is clearly shown on the for-

(Testimony of Charles L. Stokes.)

ward part of the power unit, to which these three screws are attached.

Q. In other words, it is the base of the nozzle structure to which the nozzle which you have just removed is attached?

A. No. I am referring to the shoulder, an abutment on the power unit on the casing of the gun in suit.

Q. But this screw base here is secured to the box or body of the machine?

A. That is right.

Q. And is this screw base here not secured to the body [336] of the box, or the machine?

A. Which place do you refer to?

Q. This screw base.

A. That I don't see from the front at all.

Q. Well, it is an extension out there to receive the nozzle?

A. Purely the nozzle, nothing else, no gas pipes or control valve, or anything of that kind.

Q. No gas pipes running to the nozzle proper?

A. That is right.

Q. The closing language of this claim is, "whereby said wire feeding wheels are visibly disposed in in said channel." A. Yes.

Q. Now then, that is particularly adaptable to plaintiffs' machine? A. Yes.

Q. In other words, referring to this side of the body (indicating), the abutment is a part of that side of the gun? A. That is true.

(Testimony of Charles L. Stokes.)

Q. So that the nozzle base is secured to that body? A. Yes.

Q. At one side only? A. That is right.

Q. And the other side is wholly open? [337]

A. That is right.

Q. So that this is exposed and makes for the explanation, "whereby said wire feeding wheels are visibly disposed in said channel"?

A. I don't think it is particularly applicable.

Q. But it is correct, isn't it?

A. It is true in plaintiffs' teaching—

Q. Wait a minute. I will ask you about that.

A. All right.

Q. But it is true that the "whereby" clause there, "whereby said wire feeding wheels are visibly disposed in said channel"—that is correct, you said?

A. Yes, that is true in plaintiffs' device.

Q. And this channel is open at the rear and upper portion of that device? The feed wheels can be clearly seen or they are made visible from the rear? A. That is right.

Q. Do you mean to say that in the same sense that plaintiffs' machine is constructed to give visibility to the feed wheels, that the Mogul machine is constructed to give the same visibility—as an engineer now, giving the court the benefit of your opinion on that? [338]

A. You are asking my opinion as an engineer.

(Testimony of Charles L. Stokes.)

Q. No. I am asking you to state the fact in regard to a structure which——

A. The claims simply say that the wheels shall be visibly disposed in this channel, and I say that these wheels are visibly disposed in this channel in accordance with the claim.

Q. Referring to the Mogul gun?

A. That is right. The claim doesn't say the wheels must be totally visible or partly visible. It simply says "visible".

Q. I will call your attention to the fact that the claim does not say that the wheels shall be visible. The claim recites a physical structure of such a nature whereby—that "whereby" is the conjunction—"whereby said wire feeding wheels are visibly disposed in said channel." In other words, you have a structure here of such a nature that these wheels, these feeding wheels, are visibly disposed or positioned, put in place. Isn't that correct?

A. My contention——

Q. Isn't that correct—yes or no.

A. My contention is——

Q. Please answer the question yes or no.

The Witness: Read the question, please.

(Question read by the reporter.)

A. That is my contention. [339]

Q. Would it be practical to take plaintiffs' machine and enclose this side from which we see the pipes extending from the nozzle base?

(Testimony of Charles L. Stokes.)

A. Will you please modify that by what you mean by "enclose"?

Q. Would it be practical to close it up as a box?

A. You could do anything you want with it.

Q. Is there any other advantage in opening up that structure to the extent to which it is left open back just in the rear of the nozzle base?

A. Down to where?

Q. Down to the upper end of the handle?

A. I think there must be, because I find that same hole going through the defendants' gun, so I assume you are referring to the Mogul, and I see that same thing all the way from the back of the nozzle down to the base of the handle in the Mogul.

Q. You don't find an open space in the rear of the nozzle base down to the handle, in the Mogul gun, do you? A. Yes.

Q. Will you please point it out?

A. I had the handle off this morning.

Q. That isn't an open space. I am not talking about that. I am talking about an open space, in the sense in which the plaintiffs' gun is left by construction permanently open. [340]

A. You refer to those spaces holding the tubes?

Q. All of that open space there between the nozzle base and the feed wheel.

A. No. The Mogul gun is closed in an equivalent, similar space to that which you refer to; it is enclosed down to the top of the hollow handle.

(Testimony of Charles L. Stokes.)

Q. Now, in operating plaintiffs' gun, by reason of this construction, "whereby said wire feeding wheels are visibly disposed in said channel," it is possible to see the wire and the feed wheels while you are actually operating the gun, without even pulling it back close to your eyes, isn't that true?

Mr. Blount: Just a minute. I think that is the seventh or eighth time that identical question has been asked from this identical witness.

The Court: Well, he may proceed.

Mr. Blount: And it is repetition.

A. In the plaintiffs' gun you can see the wire entering from the back. You can't see it leaving in the front, unless you look down the front, the same as in the defendants' Mogul gun.

Q. By Mr. Litzenberg: But you can see it from the side?

A. You can see it from the side, the same as you can in the Mogul gun, as I testified.

Q. Do I understand you to say that you can, in the [341] same sense, see the wire being fed in the Mogul gun while it is being held in operative position?

A. I told the court this morning that I couldn't see it enter from the back. Otherwise, yes. I can see it from the side and from the top.

Q. From what side? From where I hold the gun, can you see the wire?

A. You are asking me if I could see it. And I said yes, I could see it from this side.

(Testimony of Charles L. Stokes.)

Q. I am talking about holding the gun out in a position almost at arm's length, the way they hold it when they operate it. That is the purpose of having that thing visible in operation, is it not?

A. I don't know. I would hold the gun any way I wanted to operate it. If you wanted to hold it off at arm's length, you could do it, and if you wanted to hold it close, you could do it.

Mr. Litzenberg: That is all I will ask this witness.

Redirect Examination

Q. By Mr. Huebner: Mr. Stokes, from your study of the Lensch and Leder patent in suit, do you find any teaching that the wire, as distinguished from the wire wheels, must be visible from the—strike that out. Do you understand from your study of the Lensch and Leder patent in suit that the wire must be visible from the back [342] of the gun during feeding?

A. There is no teaching, as I have studied this patent, that the wire shall be visible from the rear. The structure provides an open channel in which the wire feeding wheels shall be visible.

Q. Now, while you can see the wire in the defendants' Mogul gun from the top and from the side while the wire is feeding during operation, would it involve much, if any, change to see the wire feeding from the rear of the Mogul gun?

A. I would say as an engineer that this latch could be so constructed and designed that you could

(Testimony of Charles L. Stokes.)

see the wire coming in from the back, with very slight modification.

Mr. Litzenberg: We will concede that. That isn't what we have before us.

Q. By Mr. Huebner: Do you observe, from your study of the Lensch and Leder patent in suit, whether it is a fact or not that the power unit and the combustion unit cooperate in performing the function of feeding wire, melting it and spraying the molten metal?

A. In a metal spray gun, of course they must cooperate. Primarily, we will say, in the feeding of wire, in the first place, this wire, as I testified, must go through in practically a straight line, through the open channel in the power unit, to be set to the wire guide in the nozzle base of the combustion unit and to be melted and sprayed, [343] etc.

Q. Now, are there any instructions in the patent in suit that the wire, while feeding, shall be visible, or does the patent merely tell us that the wire feeding wheels shall preferably be visibly disposed?

A. Only the wheels, that is all.

Q. Do claims 3 and 4 say anything about the wire feeding wheels being visibly disposed in the channel, or is that reference only in claim 2?

A. I will have to check that for one moment.

Q. Here is a copy of the patent.

A. The "whereby" clause as to wire feeding is only in claim 2, that is, wire feeding wheels, I should say.

(Testimony of Charles L. Stokes.)

Q. And do claims 3 and 4 have any reference to the wire feeding wheels being visibly disposed in the channel?

A. Yes. Claim 4 has a pair of wire feeding wheels and means for effecting the visible feed, comprising these channels, etc.

Q. Does claim 3 say anything about the visible feed of the wire or the visibility of the wheels in the channel?

A. No. It says nothing about visibility in that claim at all.

Q. Assuming, Mr. Stokes, the advantage of having visible wire feeding wheels located in an open channel, for purposes which the patent in suit teaches, and which was testified to here, is it your opinion that that structure is [344] found in substance in the Mogul gun?

A. Quite in substance, yes.

Q. Does the Mogul gun embody anything more than a slight impairment of that function, in that you do not have quite as full visibility of the wheels as you do in the patent in suit?

A. The visibility is, of course, only to a certain degree of that of the plaintiffs' patent, but the wire is visible during operation.

Q. And are the wheels visible during operation?

A. Yes.

Q. In the Mogul gun?

A. In the Mogul gun.

(Testimony of Charles L. Stokes.)

Q. What is the difference in structure and function between the cover of the French gun, Defendants' Exhibit N, and the pivoted wheel mounting of the Mogul gun?

A. The difference in function is, the cover of this gun completely encloses a box structure, which holds the wire feeding wheels, with the consequence that any gas or leak of gas back through the passages will accumulate in here, and if backfire occurs, detrimentally; second, there is no means here for the release of dust or fines, which may clog these wire feeding wheels. [345]

Q. Did you mean in your testimony on cross examination to say that the French gun has an open space between the turbine and the gears?

A. No. I said it was a space. It was not an open space or open channel, in the sense of the patent in suit. It is a space, because obviously you must have a space to accommodate these gears. But I also pointed out that these gears are in a space, and that space does not extend the full length of the box, so that while it is in a space, it is not in a space as indicated by the patent in suit, between the inside of these housings. It is the forward part of the turbine housing, yes.

Q. And in referring to the open space between the turbine housing and the gear housing in the patent in suit, to what do you refer?

A. I refer to what is termed in the patent an

(Testimony of Charles L. Stokes.)

open channel, which is not enclosed in a box-like structure, as in this French device.

Q. But it has communication with the atmosphere?

A. Communication with the atmosphere, which will eliminate or dissipate any explosion pressure, and also permit venting of fines and dust.

Q. In your cross examination, where you stated that most of the prior patents had detachable nozzles, did you mean to use the word "nozzle" and "combustion unit" synonymously? [346]

A. I have used the word "nozzle" quite separately to "combustion unit", with these patents, I think with the exception of the Morf patent, and even the Morf patent shows a rudimentary nozzle. That nozzle is simply a part of the combustion unit in the patent in suit, and they are all practically made detachable.

Q. When you say they are made detachable, you are referring to the nozzle?

A. I am referring to the detachment of the nozzle either from the combustion unit, if there is one, or from the box-like structure, if it has no detachable combustion unit.

Q. You have pointed out that in the patent in suit the combustion unit is this part which I am indicating, and which is mounted upon the abutment of the member. Is that correct?

A. That is correct.

(Testimony of Charles L. Stokes.)

Q. Now, taking this French gun as one embodiment of the prior art in which a nozzle, as distinguished from a combustion unit, is mounted upon the rest of the device, do you find in this prior device a combustion unit in the sense of the patent, as a combustion unit being detachable from the rest of the device?

A. If I so indicated, I certainly didn't intend that. The French patent simply has a nozzle, like the plaintiffs' device, which is a part of the combustion unit, which is [347] separable from the power unit; and that is not present in the French device.

Q. In the French device the gas and air passages go up through all of the box, do they not?

A. Of the very box itself, that is true.

Q. And is that forward wall of the box in the French device removable, in any sense of the word, from the housing or casing for the gun?

A. It is part of the housing or casing, and in no way connected with anything else except the side wall.

Q. In that French device, if there should be an explosion or fusion of the metals in that front wall of the box, would it be necessary to reconstruct the machine, or could that front wall be taken out and a new front wall put in?

Mr. Litzenberg: We object to that as conjectural and as not at all pertinent.

The Court: Well, he can answer this question.

(Testimony of Charles L. Stokes.)

A. Inasmuch as this French patent is a die casting, for instance, and the passages filled in due to some explosion or fusing, I think it is correct that the entire die casting would have to be replaced.

Q. Would that be true of the patented gun?

A. No, because the combustion head is designed to be separable for easy replacement.

Q. Would it be correct of the Mogul gun?

A. The same thing applies to the Mogul gun.

[348]

Q. As to the patent in suit?

A. As to the patent in suit.

Mr. Huebner: That is all.

Recross Examination

Q. By Mr. Litzenberg: May I ask, Mr. Stokes, when we pick up the plaintiffs' gun and we consider the pipes extending through the handle for carrying the gases up to the nozzle, that, I believe, you consider the combustion unit, the pipes extending up, including the nozzle, complete, with the valve in the lower end of these pipes? That is what you call the combustion unit?

A. Yes, as indicated in the patent.

Q. Would you not say that taking these pipes in the French machine, including the valves and the construction which carries the gases through and into the nozzle, that while it is not in the same form, it is the mechanical equivalent of the structure there? In other words, a construction to receive

(Testimony of Charles L. Stokes.)

explosive gases and convey them in mixed form into the nozzle?

Mr. Huebner: Just a minute. That is a compound question.

The Court: Answer the first question first. The latter is largely explanatory.

Mr. Huebner: He just asked if it is the same mechanical construction, and then he used the word "unit." [349]

Mr. Litzenberg: I used the word "unit" to call the witness' attention to——

A. Mechanically equivalent in this structure it is not, because it is not detachable and has no means of making it detachable. When you come to a device that is adapted to carry these different gases to a nozzle, I say yes, of course it carries them to a nozzle through the wall of the closed box.

Q. You wouldn't say that the detachability of it is what makes it or makes it not the mechanical equivalent?

A. In this structure, yes. I am discussing the patent.

Q. Well, I am discussing the structure. Then you have a mechanical structure made with one part that is detachable, and you have got the same identical structure, let us say, made without being detachable. Now, when it comes to the question of possible mechanical function, is not one the mechanical equivalent of the other?

Mr. Huebner: Just a minute. Again, your Honor,

(Testimony of Charles L. Stokes.)

the question is double-barreled and ambiguous, and he argues with the witness.

The Court: Well, if it is equivalent, how far is it equivalent, as to ultimate result, unless it is functional?

Mr. Litzenberg: I said "functional", that the only difference between the two parts was that one was detachable and the other one was not, and we know it is not [350] invention to make a thing detachable or in two parts, where it has been made in one part.

Mr. Huebner: The witness didn't say that the only difference was the fact that one was detachable and one wasn't.

Mr. Litzenberg: I said it. You didn't give him a chance to answer.

Mr. Huebner: He pointed out that there are structural differences. He says they both deliver the gases for combustion, but he says that one of those structural differences involves the fact that the units are detachable.

Mr. Litzenberg: That is all true. That is all elementary.

Q. By Mr. Litzenberg: How many walls would a channel have to have in order to be a channel, Mr. Stokes?

Mr. Huebner: Which channel are you talking about?

Mr. Litzenberg: Never mind. That is a straight mechanical question.

(Testimony of Charles L. Stokes.)

Mr. Huebner: I object upon the ground that it is irrelevant and immaterial.

The Court: The witness in general stated what he understood by the word "channel."

Mr. Huebner: That is right.

The Court: And I think this is proper.

Mr. Litzenberg: Let him answer the question.

A. I think a channel, properly confined, would have [351] two or more walls. I think a channel might have one wall, in the case of a cylinder. In a straight line or angular lines, it might have two or more walls.

Q. But if it has a closed bottom and an open top and open ends, is it not still a channel?

A. I have given my definition of a channel.

Mr. Litzenberg: That is all.

Mr. Huebner: That is all. Mr. Martin. [352]

JESSE C. MARTIN, JR.,

called as a witness on behalf of plaintiffs in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

A. Jesse C. Martin.

Direct Examination

Q. By Mr. Huebner: What is your residence address, Mr. Martin?

A. 1325 Miller Drive, Los Angeles.

(Testimony of Jesse C. Martin, Jr.)

Q. Are you connected with the Metal Spray Company?

A. I am president of the Metal Spray Company.

Q. How long have you occupied that position?

A. Since 1935, September.

Q. Are you familiar with the gun of the patent in suit as exemplified in Plaintiffs' Exhibit 5?

A. I am.

Q. Does that have a model number in your shop?

A. Model 126.

Q. Do you have a similar gun in a different size bearing another model number?

A. The smaller gun is Model 81.

Q. Is the smaller one identical in construction with the larger one? A. Identical.

Q. Are there any other model numbers for identifying [353] guns manufactured and sold under the patent in suit? A. No other numbers.

Q. Will you state how many guns have been manufactured and sold by the Metal Spray Company under the patent in suit, such as Models 81 and 126, embodied as Plaintiffs' Exhibit 5?

A. About 150 total of both sizes.

Q. Will you state to the court the names of a few of the more prominent customers who have purchased such guns from the Metal Spray Company?

A. Yes. I have a partial list here.

Q. I just want representative names.

A. Johns-Manville Company, Lompoc, Califor-

(Testimony of Jesse C. Martin, Jr.)

nia. Internationál Harvester Company. Sinclair Refining Company. Atlantic Refining Company.

Mr. Litzenberg: What is your purpose, Mr. Huebner, in having these——

Mr. Huebner: I am establishing commercial success.

A. Reading Railroad Company. Aluminum Company of America. Dow Chemical Company. Westinghouse Electric & Manufacturing Company. Detroit Edison Company. British Oxygen Company. Shell Oil Company, Amsterdam, Holland. Southern Counties Gas Company, Los Angeles. Southern California Edison Company, Los Angeles. Eclipse Aviation Corporation. Australian Oxygen Company, Sydney Australia. St. Louis-San Francisco Railroad Company, Springfield, [354] Missouri. Holly Sugar Company, Santa Ana. Ramsey, Ltd., Honolulu. Pacific Coast Engineering Company, Oakland. Hamler Boiler & Tank Company, Chicago. Fiat Motors, Torino, Italy. J. I. Case Company, Chicago.

Q. I think that will be enough.

A. That is a partial list.

Mr. Huebner: You may take the witness.

Cross Examination

Q. By Mr. Litzenberg: Mr. Martin, how many of the Model 80—was it 80 or 81?

A. 81, the smaller size.

Q. How many smaller sized guns have you sold?

A. I think probably about 12 or 15. It doesn't sell as extensively as the larger size gun.

(Testimony of Jesse C. Martin, Jr.)

Q. Can you tell offhand how many of the larger guns you have sold?

A. Both together, I would say about 150 guns, the 81 and the 126.

Q. There is no difference in the construction and operation between the smaller gun and the larger gun, excepting as to size?

A. There is only one slight difference in the gearing. The smaller gun has what we term a double gear, and the larger gun has a triple gear, that is, there is a triple gear reduction in the larger tool, and there is a double [355] gear reduction in the smaller one. Outside of that, they are exactly the same.

Mr. Litzenberg: I guess that is all.

Mr. Huebner: That is all. With that, your Honor, the plaintiff rests.

Mr. Litzenberg: Defendant rests.

The Court: What shall we do about the argument?

(Discussion as to argument and briefs omitted from the transcript.)

Mr. Huebner: Why don't we leave it up to the court as to whether the court wishes argument?

Mr. Litzenberg: That is agreeable.

The Court: Very well. 20 and 20 days, briefs to be concurrently filed.

Mr. Huebner: And no reply?

The Court: And no reply. [356]

DEFENDANTS' EXHIBIT A

Department of Commerce
United States Patent Office

To all persons to whom these presents shall come,
Greeting:

This Is to Certify that the annexed is a true copy from the records of this office of the File Wrapper, Contents and all Drawings, in the matter of the Letters Patent of Rudolph Lensch and Paul Leder, Number 2,096,119, Granted October 19, 1937, for Improvement in Metal Spray Guns.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-fifth day of July, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States of America the one hundred and sixty-third.

[Seal]

CONWAY P. COE,
Commissioner of Patents.

Attest:

D. E. WILSON,
Chief of Division.

NUMBER (Series of 1935)

PATENT NO.

74028

1936

DATE OCT 19 1937

DIV. 46

(EX'R'S BOOK) 34
7

Name RUDOLPH LENSCH AND PAUL LEDER

State of LOS ANGELES ALHAMBRA
CALIFORNIA

Invention METAL SPRAY GUN

ORIGINAL

RENEWED

APPLICATION FILED COMPLETE APR 13, 1936

Petition, Specification,
Oath, First Fee \$30, APR 13, 1936
3 sheets Drawings,

Examined and passed for Issue June 3, 1937
M. Fayler Exr. Div. 46

Notice of Allowance JUN 4 - 1937, 1937
By Commissioner.

Final Fee \$30 Sept 7, 1937

Attorney JESSE C. MARTIN, JR 1325 MILLER DRIVE LOS ANGELES CALIF

Associate Attorney

No. of Claims Allowed 4 Print Claims 2 in O.G. Class 91-102

Title as allowed Metal Spray Gun

19

filed

Division of App., No.

PARTS OF APPLICATION FILED

X 13-65

J. C. Martin, Jr.
Consulting Engineer & Patent Counsel
1325 Miller Drive
Los Angeles, California

April 8, 1936

Commissioner of Patents
Washington, D. C.

Sir:

Herewith please find application for Letters Patent of Rudolph Lensch and Paul Leder for improvements in Metal Spray Gun, together with Post Office money order for \$30 to cover the filing fee thereon.

Respectfully,

J. C. MARTIN, JR.

JCMJr:S

encls

PETITION AND POWER OF ATTORNEY

Honorable Commissioner of Patents:

Your petitioners, Rudolph Lensch, a citizen of the United States, and Paul Leder, a citizen of Germany, both residing in the County of Los Angeles, and State of California, whose Post Office addresses are respectively, No. 365 North Avenue 52, Los Angeles, California, and No. 16 Aurora Terrace, Alhambra, California, pray that Letters Patent may be granted to them for the new and useful

improvements in Metal Spray Gun, set forth in the annexed specification, and they hereby appoint

Jesse C. Martin, Jr.

Registration No. 11,241,

of 1325 Miller Drive, Los Angeles, California, their attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

Signed at Los Angeles, in the County of Los Angeles and State of California, this 7th day of April, 1936.

RUDOLPH LENSCH
PAUL LEDER

SPECIFICATION

The hereinafter described invention relates to the spraying of molten metal, being characterized by improvements in devices for this purpose, which devices utilize gaseous fuels for melting the metal as fed through them in wire form and fluid pressure for atomizing and depositing the molten metal against a base or part to be metal coated.

Among the objects of this invention is the provision of certain new and novel features and advantages beyond the improvements in Metal Spraying Devices as set out in United States Letters Patent granted to Rudolph Lensch and Paul Leder, January 8, 1935, No. 1,987,016.

One of the objects of the present invention is to provide an improved arrangement of controlling the wire fed through the gun whereby any desired pressure may be exerted on the wire in its passage through the wire feeding wheels, thereby better preventing slippage of the wire and effecting through the uniformity of its feed an improved quality of the molten metal deposition.

Another object of this invention is to provide a hinged latch construction whereby the top wire feeding wheel is releasably confined so that during wire feeding it can be set to engage the wire and after or during wire feeding can be unlatched and lifted on its hinged connection out of the way.

Another object of this invention is to increase the efficiency of the power plant as employed for driving the wire feeding mechanism of the gun through improvements, (1) in the turbine used as the prime mover, and (2) in the gearing of the transmission, the housing of the transmission and the manner of setting the transmission gearing in its bearings.

A further object of this invention is to form the combustion unit of the gun as a separate and distinct entity from the mechanical unit or power plant of the gun and to so provide conduits for carrying the fluid for atomizing the molten metal of the gun as well as the fuel for melting the metal that they will be contained in a single unit, one end of which terminates in a base to which the fuel nozzle of the gun is attached, and the opposite end of which terminates in the valve controlling means for the fluid

pressure and fuel in its passage through the unit—thereby (1) condensing the space which these conduits occupy, eliminating joints subject to leakage and permitting of a construction of relatively light weight, and (2) making a construction for carrying fluid pressure and fuel which can be assembled in the gun as a unit as well as replaced as a unit for expeditious repair.

Another object of this invention is to provide in a metal spray gun a casting as an integral part which will contain the housings for encompassing the gears of the transmission as well as the turbine for driving the transmission gears and to so form the casting that it will have a channel way for the wire feed, free and clear of the interiors of the gear and turbine housings.

Another object of our invention is to provide a new and novel way of handling the turbine exhaust, so that the exhaust will be expanded between the cover of the turbine and the turbine impeller and released through openings in the turbine cover, and after passing through these openings will be baffled to effect its discharge circumferentially, thereby effecting a greater efficiency of the turbine through the improved means of governing its exhaust.

A further object of this invention is to improve the efficiency of the combustion unit of the gun through the provision of a baffling arrangement whereby the fluid pressure for atomizing the molten metal will be better distributed around the molten

metal in its discharge through the air cap at the end of the gun.

In order to more fully understand our invention reference should be made to the accompanying drawings, in which Fig. 1 is a side elevation with portions broken away and certain parts in section to better illustrate the improvements. Fig. 2 is a side elevation of the upper portion only of the structure of our invention, this view showing the side directly opposite the side of the elevation of Fig. 1. Fig. 3 is a sectional plan view taken on line 3—3, Fig. 2. Fig. 4 is a rear end elevation of the upper portion only of our improved structure. Fig. 5 is a broken perspective view of the wire feeding mechanism of our improvements. Fig. 6 also shows in sectional side elevation another view of the improved wire feeding arrangement of our structure taken on line 6—6, Fig. 4. Fig. 7 is a side elevation showing the combustion unit only of our improved gun structure, while Fig. 8 is a rear end view of the upper portion thereof.

Referring to the drawings:—Description will first be made of the power plant of our structure in which numeral 10 denotes the casting which contains the chambers for housing the turbine 11, and the gear train cooperating therewith. Numeral 12 denotes the turbine shaft carrying the worm 13, this shaft being mounted in ball bearings 14 and 15. Ball bearings 14 and 15 are adjustably confined endwise by threaded containers 16 and 17 respectively. Containers 16 and 17 are locked in position

after adjustment by lock nuts 18 and 19 respectively. Numeral 20 denotes a cross shaft substantially at right angles to turbine shaft 12. Shaft 20 carries a worm wheel 21 and a worm 22, and is mounted in bearings 23 and 24 at its opposite ends. The bearings 23 and 24 are aligned so as to bring the worm wheel 21 into meshed engagement with the worm 13 of turbine shaft 12. Shaft 20 is adjustably confined endwise through the threaded engagement of bearing 23 with casting 10 on the one end and through the threaded engagement of bearing 24 on the opposite end as provided in the gear chamber cover 25. Lock nuts 26 and 27 confine the bearings 23 and 24 respectively, in adjusted position. Numeral 28 denotes a shaft substantially at right angles to shaft 20. Shaft 28 carries a worm wheel 29, and is mounted in bearings 30, 31 and 32 so as to bring worm wheel 29 into meshed engagement with the worm 22 of shaft 20. Shaft 28 is adjustably confined endwise through the threaded engagement of bearing 30 as provided in the gear chamber cover 32a. A lock nut 33 confines the bearing 30 in adjusted position. Shaft 28, termed as the wire feed shaft, carries a wire feeding wheel comprising two portions, 34a and 34b. Portion 34a consists of a spur gear, while portion 34b consists of a grooved knurl wheel. Situated immediately over the wire feeding wheel of shaft 28 is another similar wire feeding wheel, comprising portions 35a and 35b. Portion 35a consists of a spur gear adapted to mesh with the spur gear 34a, while portion 35b con-

sists of a knurled wheel adapted to cooperate with the knurled wheel 34b in the feeding of the wire through the gun as hereinafter described. The wire feeding wheels, comprised of the parts 34a—34b and 35a—35b are known as the lower and upper wire feeding wheels, respectively. The meshing of the gear portions of the wire feeding wheels is brought about only during the feeding of wire and through a new and novel arrangement of parts involving a latch device pivotally mounted in bearing plates 36 and 37 secured to lugs 10a and 10b of casting 10. The pivotal mounting is occasioned by a shaft 38 fitting bearings made in the plates 36 and 37. Shaft 38 carries a part 39, having depending portions containing bearings for carrying a shaft 40, upon which is mounted the upper wire feeding wheel 35a—35b. Secured to the top of part 39 by bolt 41 is a latch member 42 having wing portions 42a and 42b extending from its side. The member 42 is adapted to swivel on the bolt 41. Now, secured to the bearing plates 36 and 37, respectively, are two forked members 43 and 44. These forked members have open jaws, the jaws being set so that their open ends are opposed to each other. The jaws of members 43 and 44 are adapted to receive the wing portions 42a and 42b of latch member 42, the cooperating edges of the wings and jaws being beveled so that when the latch member 42 is swiveled in its connection a firm but releasably confined engagement of member 42 will be made in the jaws of members 43 and 44. In this latch construction it will be noted that the de-

pending bearing portions of part 39 carrying the upper wire feeding wheel 35a—35b, are adapted to fit between the faces 10c and 10d of the main casting 10—a channel being formed between said faces of casting 10 to receive the part 39 when the latch member 42 is engaged in the forked jaws of members 43 and 44. At this time the gear portion 35a of the upper wire feeding wheel and the gear portion 34a of the lower wire feeding wheel are brought into meshed engagement for the feeding of wire through the knurled portions 34b and 35b of the respective wire feeding wheels. A spring tension device is provided in the latch member 42 which gives the ability to the latch structure to adjust the pressure applied upon the wire in its feed through the knurled portions 34b and 35b of the lower and upper wire feeding wheels, respectively. This device comprises a spring 45 chambered in latch member 42, the upper end of member 42 being tapped to receive a spring tension adjusting screw 46.

In the drawings, Fig. 1, the latch device is shown in dotted lines swung up in the out of service position, that is, when no wire is being fed through the gun. By our improved structure the operator has a full vision of the wire, from the time of its entrance through the rear wire guide 47 and across the face of the knurled portion 34b of the lower wire feeding wheel into the front wire guide 48, before the latch member 42 is dropped down on its pivotal mounting into the channel way of the main casting 10 and its wings 42a and 42b are locked in wire

feeding position in the jaws of members 43 and 44. The improved wire feeding arrangement of our structure including the latch device and channel between the sides 10c and 10d of main casting 10, for receiving the latch member 42 and upper wire feeding wheel as depended therefrom, is well shown in perspective view Fig. 5, while the sectional illustration of Fig. 6 shows the structure in functioning position during the feeding of wire.

Having described the wire feeding structure of our invention we will proceed with the description of the combustion unit thereof and in this connection reference is made particularly to Fig. 1, Figs. 7 and 8, in which Fig. 1 shows this unit assembled in place in the gun structure, and Fig. 7 shows the combustion unit formed as a separate entity ready for insertion into the gun assembly. Numeral 49 denotes the nozzle base member and numeral 50 the compressed air and fuel manifold member—these members forming the termini of the combustion unit. The compressed air used as the atomizing element for the molten metal and as power for driving the turbine of the power plant is carried by conduit 51, the threaded side outlet thereof, 52, being adapted to carry off a portion of the compressed air to the turbine impellor 11 through the passage 52a in main casting 10. Conduit 53 and conduit 54 carry respectively the oxygen and acetylene used as fuel. Conduit 53 and conduit 54 are united together by a combining chamber 55—out of which a conduit 56 leads these mixed gases. The lower ends of the

conduits 51, 53 and 54 are made up in fluid tight joint engagement to manifold member 50, while the upper ends of the conduits 51 and 56 are similarly made up in joint engagement with nozzle base 49. In this structure a definite distance is maintained between the nozzle base 49 and the manifold 50 and the conduits 51, 53, 54 and 56 may all be removed and replaced in the gun assembly at one time. This makes for an efficiency in a metal spray gun not heretofore possible through the ability to expeditiously replace the combustion unit of the gun in the event of failure of the gaseous passages thereof. Numerals 57, 58 and 59 denote respectively the compressed air, oxygen and acetylene valves used for controlling the gaseous fluids of the combustion unit, the same being made up to manifold 50. Furthermore by our improved unit assembly of the fluid carrying conduits of the gun, a more compact and simplified gun structure is effected.

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In the assembly of the unit in the gun a hollow screw 62, tapped into casting 10, through which compressed air leads into passage 52a, together with the screws 63 passing through the holes 64 in nozzle base member 49 and fitting tapped holes in casting 10, hold the unit in releasably confined position in the gun assembly.

Nozzle base 49 is threaded at 49a and 49b, the thread 49b being adapted to receive a threaded union nut 65 holding the gun nozzle 66 in position. Encompassing nozzle 66 and secured to threaded end 49a of nozzle base 49 is air funnel 67. The smaller end of funnel 67 is adapted to receive the air cap 68 through threaded engagement between these respective parts. Lock nut 69 retains the air cap 68 in adjusted position in its threaded engagement with funnel 67. It will be noted that a baffle plate 70 is carried by the union nut 65. Baffle 70 is provided with a plurality of openings 71 through which the compressed air from the conduit 51 of the combustion unit is checked and deflected around the nozzle 66 and through the funnel 67 and air cap 68 in a highly efficient manner in effecting the atomization of the molten metal.

In the improved turbine structure of our invention numeral 11 denotes the turbine ^{impeller} ~~impeller~~ as fixed to the turbine shaft 12. Main casting 10 is chambered to receive ^{impeller} ~~impeller~~ 11, a threaded rim being provided on the ^{impeller} ~~impeller~~ chamber to receive the threaded turbine cover 74. Turbine ^{impeller} ~~impeller~~ 11 is provided with a cavity between the inner circumferential edge bounding its buckets 75 and its hub 76 - this space providing what we choose to term the turbine ^{expansion} ~~impeller~~ expansion chamber. Now in the turbine casing cover 74 and directly opposite the expansion chamber of ^{impeller} ~~impeller~~ 11, is a chambered portion carrying a plurality of openings around it as denoted by numeral 77. Openings 77 are preferably of like size and inclined upwardly. Numeral 78 denotes a cup-like baffle secured to turbine cover 74 through the medium of



lock nut 18 of the ball bearing container 16. Baffle 78 is not so as to provide a circumferentially extending slot 79 between its cupped edge 78a and the face 74a of turbine cover 74, thereby providing a free discharge for the air as exhausted from impeller 11 through the openings 77 of turbine casing cover 74.

From the foregoing description it will be clear that the air as exhausted from the buckets 75 of turbine ^{impeller} 11 is held a relatively long time between the chambered portions of the ^{impeller} and the turbine cover 74 before its final release to the atmosphere through the slot 79. During this time an expansion of the air is occasioned without creating undue back-pressure. By retaining the air exhausted from the turbine ^{impeller} in this manner we have found that the initial air introduced through the passage 52a against the buckets of the ^{impeller} is utilized with high efficiency and that a much less pressure of compressed air is required to drive the turbine ^{impeller} than heretofore used, for example, in the turbine structure of our invention as covered by Letters Patent No. 1987016...

The compressed air through the passage 52a as used for driving ^{impeller} 11 is controlled through needle valve 80.

The combustion unit of our structure is housed by the handle of the gun, the same being comprised of parts 81 and 82 removably confined by the screws 83, 84 and 85.

We desire it to be understood that reasonable modifications in the structural improvements of our invention, as shown by the illustrative embodiments herewith, may be made without departing from the spirit thereof and we therefore do not wish to restrict ourselves to the exact showing made, the scope of the invention being governed by the extent of the appended claims.

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We claim:

1. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and wire feeding wheels, a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having control valves and a nozzle base, a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit and means for releasably confining said units in operative association.

2. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and wire feeding wheels, said member having a passage way exteriorly of the gear housings thereof and the walls of said passage way providing a channel; a shaft extending from the transmission gears having a wire feeding wheel adapted to rotate in said channel, a second wire feeding wheel mounted on a hinge secured to the body of said member and means for holding the said hinged wire feeding wheel in rotatable engagement with said first wire feeding wheel.

3. In a metal spray gun, a unitary member comprising the power plant thereof, said member having a turbine, transmission gears and wire feeding device, a channel way in said member free and clear of the interiors of its gear chambers, said wire feeding device comprising an upper and lower wheel and each of said wheels having a gear portion and a knurled portion, said lower wheel being adapted to rotate between the walls of said channel and said upper wheel having a pivotal mounting attached to the power plant member, and means for bringing the gear portion of the upper wire feeding wheel

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into meshed engagement with the gear portion of the lower wire feeding wheel during the feeding of wire through the knurled portions of said wheels.

4. In a metal spray gun, a combustion unit comprising a member adapted to carry combustible gases and compressed air, said member having a nozzle base, and the walls of said member having passage ways therethrough for carrying said combustible gases and compressed air; said passageways terminating on one end in said nozzle base and on the other end in connections adapted to receive the combustible gases and compressed air, and valve means carried by said unit for controlling the flow of said gases and compressed air through said passageways; said unit having means for connection to the power plant of a metal spray gun.

turbine
5. In a metal spray gun and the turbine of the power plant thereof, in combination, a turbine impellor having a central cored chamber, said chamber having a bounding edge closely adjacent the inner circumferential edge bounding the bottoms of its buckets, a turbine cover fitted to the rim of the turbine impellor housing, said cover having a central cored chamber opposite the chamber of said impellor, a plurality of openings leading out of the chamber of the turbine cover and a baffle over said openings secured to the turbine cover for directing the discharge of fluid passing through said openings.

6. In a metal spray gun, of the class described, in combination, a nozzle, a nozzle base, a union nut for securing said nozzle to the nozzle base, a baffle carried by said nut

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having a plurality of openings therethrough adapted to direct the flow of compressed air from said nozzle base, an air funnel encompassing said nozzle and ^{base} ~~base~~ and an air cap secured to the end of said funnel.

"a

Figure 2

CC 11

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In Testimony Whereof, we have hereunto set our hands at Los Angeles, California, this 7th day of April, 1936.

RUDOLPH LENSCH.

PAUL LEDER.

OATH

State of California,
County of Los Angeles—ss.

Rudolph Lensch and Paul Leder, the above named petitioners, being duly sworn, depose and say that they verily believe themselves to be the original, first and sole inventors or discoverers of the new and useful improvements in Metal Spray Gun, described and claimed in the annexed specification; that they do not know and do not believe that the same was ever known or used before their invention or discovery thereof; or patented or described in any printed publication in any country before their invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented in any country foreign to the United States on an application filed by them or their legal representatives or assigns more than twelve months prior to this application; and that no application for patent on said invention has been filed by them or their representatives or assigns in any country foreign to the United States.

And the said Rudolph Lensch does hereby state that he is a citizen of the United States and a resident of the City and County of Los Angeles, State of California,

And the said Paul Leder does hereby state that he is a citizen of Germany, and a resident of Alhambra, in the County of Los Angeles, State of California.

RUDOLPH LENSCH

PAUL LEDER

Subscribed and sworn to before me this 7th day of April, 1936.

[Seal]

ALBERTINE HIGGINS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 24, 1937.

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Oct. 19

Print of drawing as originally filed

FIG. 1.

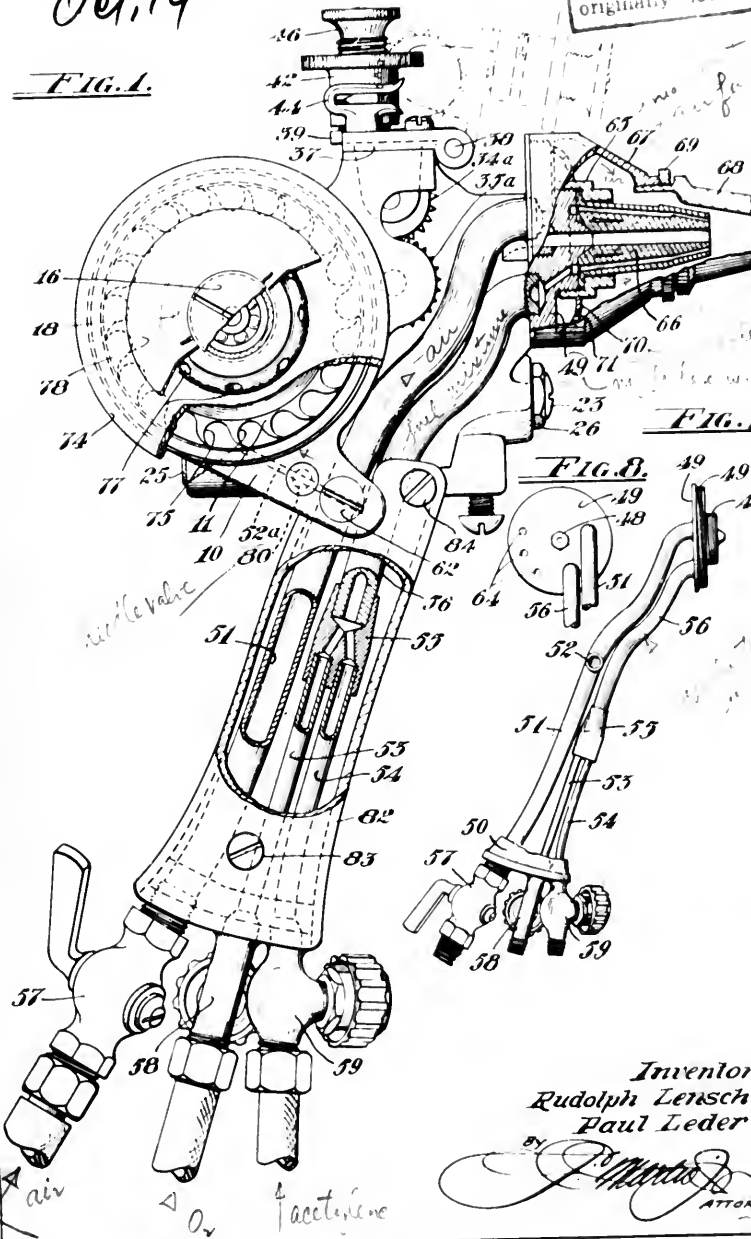
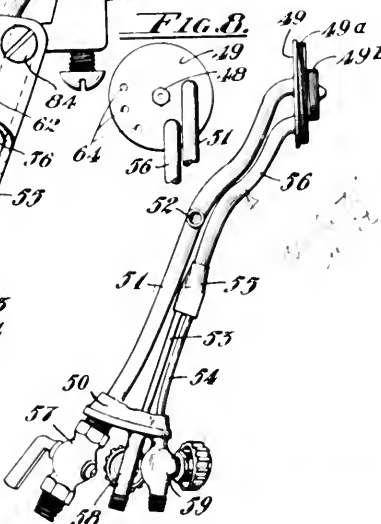


FIG. 2.

FIG. 3.



Inventors
Rudolph Zenssch and
Paul Leder

BY *[Signature]*
ATTORNEY

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Print of drawing as
originally made

FIG. 4.

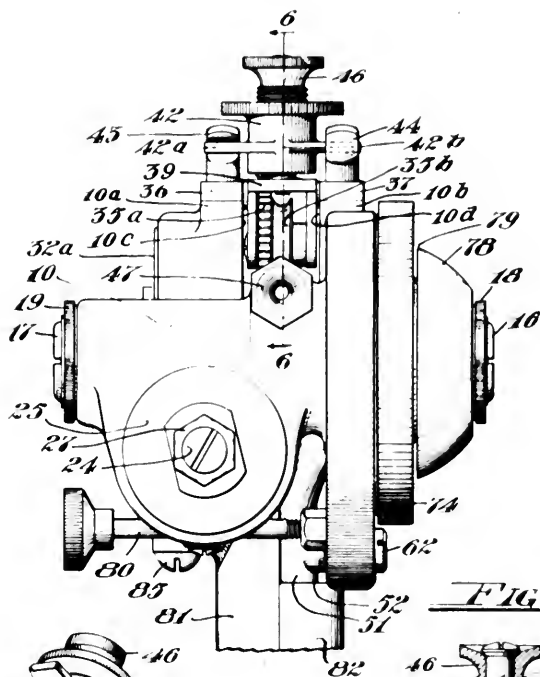


FIG. 6.

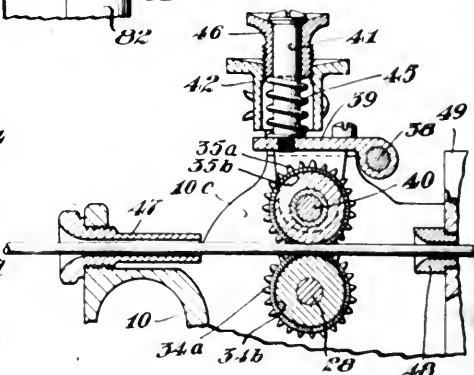
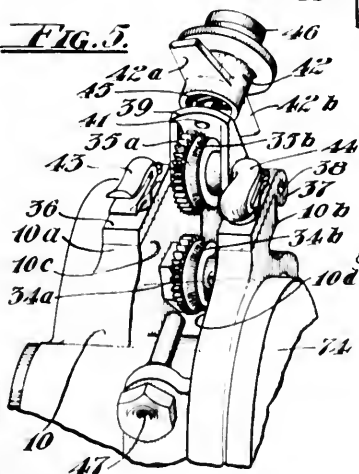
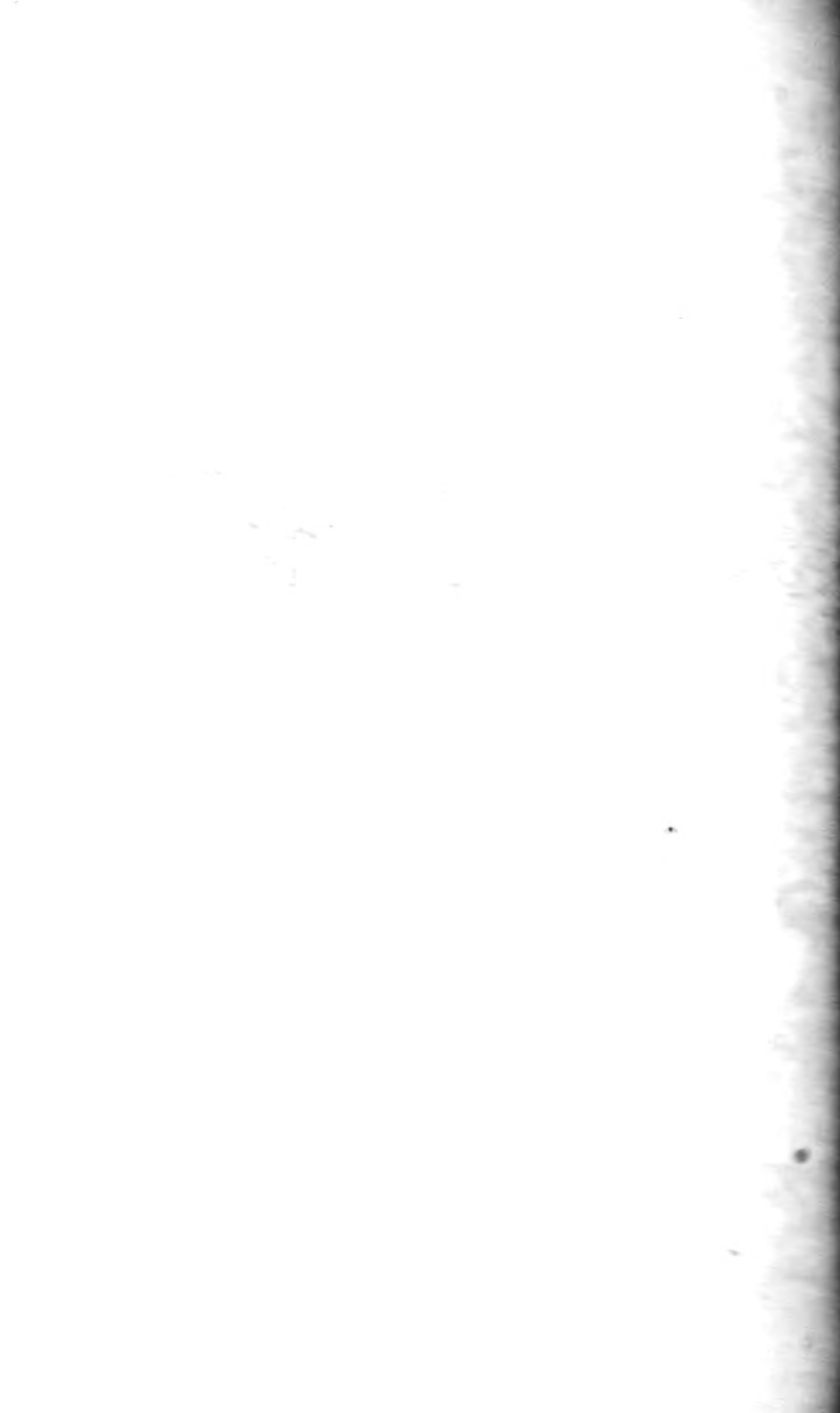


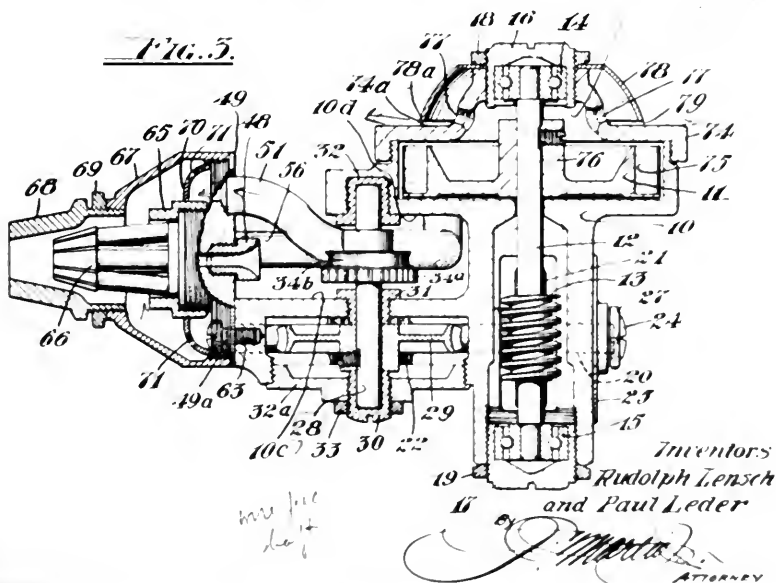
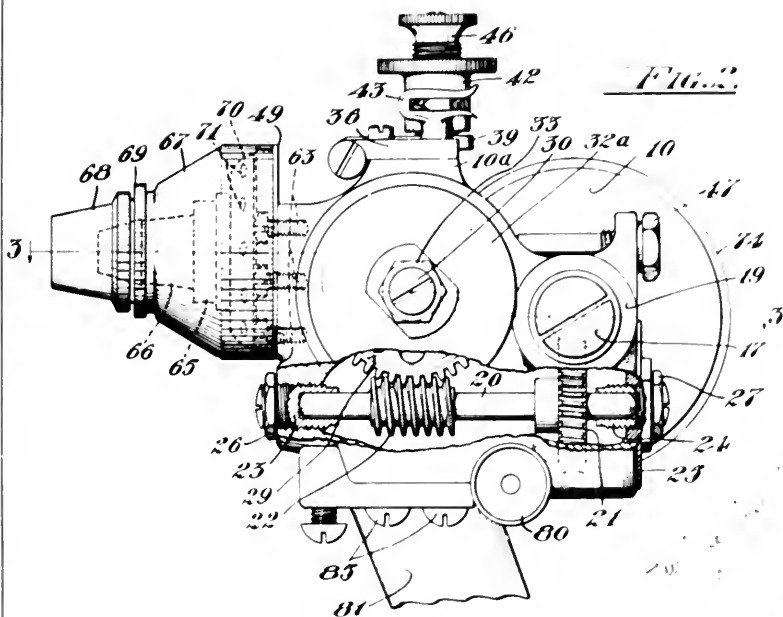
FIG. 5.



Inventors
Rudolph Lensch and
Paul Leder

J. M. [Signature]
ATTORNEY







Paper No. 3

Department of Commerce
United States Patent Office
Washington

Please find below a communication from the Examiner in charge of this application.

CONWAY P. COE,
Commissioner of Patents.

Jesse C. Martin, Jr.,
1325 Miller Drive,
Los Angeles, Calif.

Applicant: R. Lensch et al.

Ser. No. 74,028

Filed Apr. 13, 1936

For Metal Spray Gun

This application has been examined.

The following references are made of record:

Irons 1,917,523 July 11, 1933 91-12.2 UXR

British 268,431 Mar. 31, 1927 M. S. D.

(4 pages; 3 sheets)

A new oath is required. As filed, the oath states that applicants are the "sole" inventors. The new oath must refer to this application by title and serial number.

The Official Draftsman objects to the drawing in that lines are rough and blurred in parts. This defect can be remedied and the drawing will serve in its present form for purposes of examination.

Page 4, line 12, should not "lower and upper" be reversed?

Manifold 50 does not appear on the drawing.

Page 7, "impeller" (five occurrences) spelled incorrectly. Likewise in claim 5 (two occurrences).

Claim 6, "baffle" spelled incorrectly.

Claims 1 and 4 are each rejected as obviously fully met by Irons.

Claims 2 and 3 are each rejected as not presenting invention over the British patent. In the British patent the wire feeding wheels are located in a housing separate from the gear housing. The walls of the feed wheel housing of the British patent form a channel equivalent to that of applicants.

Claim 5 is rejected as drawn to an old combination. Irons shows the combination of a spray gun and a turbine. The specific form of the turbine and impeller does not have any cooperative effect on the combination. Applicants should claim the turbine structure per se.

Claim 6 is allowable, as at present advised.
W.T.

M. TAYLOR,
Examiner.

JAN 21 1937

IN THE UNITED STATES PATENT OFFICE

U. S. Patent Office

270

JUN 22 1937

Division 46

Applicants: Rudolph Lensch and
Paul Leder

Serial No. 74,028

Div. 46
Room 4613

Filed April 13, 1936

For Metal Spray Gun

AMENDMENT

The Commissioner of Patents,

Sir:

Responsive to Official action of July 20, 1936, please
amend as follows:

New oath herewith.

Official draughtsman is respectfully asked to make
such correction of the drawings as may be required, at the
expense of applicant.

Page 4, line 12, the "lower and upper" wire feeding
wheels are thought to be properly expressed as written.

Please refer to Fig. 7 of the drawings showing manifold
50, denoted by numeral leading from this member.

Page 7, lines 22, 23, 24, 25, 28 and 29, also page 8,
lines 4, 7, 8, 12, 14, 16 and 20, change the word "impellor" to
- impeller -.

Cancel claims 1, 2, 3, 4 and 5.

Claim 6, line 6, change "beffle" to - baffle -.

Please add the following claims:

27. In a metal spray gun, a power unit comprising a
member adapted to carry a turbine, transmission gears, and wire
feeding wheels, said member including housings for said turbine

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and gears and an open channel in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel, a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having control valves and a nozzle base, a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit, and means including an abutment between the nozzle base and the walls of said member for releasably confining said units in operative association whereby said wire feeding wheels are visibly disposed in said channel.

38. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing housings for said turbine and gears and having an open channel in its walls between said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate in said channel, the other of said wire feeding wheels being pivotally mounted on said member and adapted for rotation in said channel, and means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire.

49. A wire feeding mechanism for a metal spray gun comprising a member having a turbine, transmission gears, and a pair of wire feeding wheels, means for effecting the visible feed of wire through said wheels comprising: an open channel in the walls of said member between the turbine and gear housings thereof, a wire feeding wheel mounted between the sides of said channel and actuated by said transmission gears, a wire feeding wheel hingedly mounted on said member and adapted for rotation in said channel, and a spring latch for holding said hingedly mounted wire feeding wheel in engagement with said first wire feeding wheel during the feeding of wire.

Handwritten: 364

REMARKS

Relative to Irons, 1,917,523: It is desired to note that Irons does not provide for the visible feed of the wire through the gun. He does not contemplate a wire feeding mechanism other than the "conventional" construction which includes the wire feeding mechanism and feed wheels in the same housing without the ability to see the wire except by shutting off the tool and opening the cover of the mechanism housing, such, for example, as the Schoop type of wire feeding mechanism as contained in a square box housing. While Irons does provide separated power and combustion units, joining them together for operation, his structure does not teach applicant that with the conventional square box gear and feed wheel housing a channel can be formed exteriorly of the walls of the mechanism housing by the abutment of the nozzle base and the gear housing for the reception of the wire feeding wheels and so that the feed wheels will be open to view and the wire passing there through can be observed in its feeding. This utility in a metal spray gun is of great importance to a gun operator, particularly when inequalities in the metal sprayed deposits, due to irregularity of wire feed, require wire adjustments to be made while the gun is operating. Furthermore, the balling up of the wire, particularly with the softer metals such as lead, tin and zinc, requires expensive shut-downs and results in low output of the tool.

Relative to British 268,431: What is said of Irons relative to visible wire feeding is equally true of the British structure, even though the wire feeding wheels are situated in a separate housing from the turbine and gear mechanism, because it is still necessary in this device to lift the cover of the wire feed wheel housing on the hinge 13 in order to see what is going on with the wire feed; in fact, the structure does not provide visible wire feed, even though it is one step advanced from Irons or Schoop in preventing contamination of the gears and bearings of the feeding mechanism from the particles or fines of the wire. Furthermore, the British structure does not have a separate power unit and combustion unit as complete entities. The gaseous passages are contained in the walls of the mechanism housings as distinguished from being contained fully within the combustion unit. In case of back fire the fuel gases would enter the wire feed wheel case around the fit between the wire and the wire bore of the nozzle, with destructive results; whereas, in applicants' structure, leakage of the fuel gases between the fit of the wire and nozzle will, in case of back fire, pass to waste to the atmosphere without detrimental effect.

Relative to Lensch and Leder Patent No. 1,987,016: It is desired to make this patent of record in this issue, as it has a direct bearing upon the removal of the wire feeding wheels of a metal spray gun from the gear box and mechanism contained therein, whereby visible feed of the wire is occa-

sioned and the destruction of the gears and parts of the feeding mechanism from particles of the wire cut off by the knurled feed wheels is done away with. It is thought that this structure is the first to carry out these new utilities in a metal spray gun, and it is desired to make note of the fact that the present Lensch and Leder structure covers improvements of their former patent learned through the experience of service with their first metal spraying device, incorporating advantages not possessed by their original structure, even though the principles of the present invention are subordinate to same.

It may be stated that the lack of balance of the structure of patent 1,987,016 in the hands of the operator was one contributing factor to the present improvement. The principal weight of the tool, by reason of the mechanism housing being substantially all on one side of the gun handle, created a fatigue in the operator's hand to the detriment of the extended use of the tool, and to the extent that after the manufacture and sale of a number of these guns it was deemed necessary to devise ways and means to rectify this objection. The result of this was the development of the present invention, whereby the turbine and gear housings are substantially balanced on either side of the handle of the gun by virtue of the provision of the wire feed wheel channel as provided in the improvements.

The new claims herewith presented are thought to fully differentiate applicants' structure over the

references cited as well as over their original structure, and favorable consideration and allowance of same is courteously asked.

Respectfully submitted,

JESSE C. MARTIN, JR.,

Attorney.

January 18, 1937

Paper No. 5

J. C. Martin, Jr.

Consulting Engineer & Patent Counsel

1325 Miller Drive

Los Angeles, California

January 20, 1937

Commissioner of Patents,

Washington, D. C.

Sir:

Relative to application of Rudolph Lensch and Paul Leder, Serial No. 74,028, filed April 13th, 1936, for Metal Spray Gun, Division 46, Room 4613.

Please find herewith Oath referred to in amendment of January 18th, 1937, in response to Official Letter of July 20th, 1936, the same having been inadvertently overlooked.

It is asked that this Oath be filed with the said amendment of January 18th as called for therein.

Respectfully,

J. C. MARTIN, JR.

JCMJr-B

OATH

State of California,
County of Los Angeles—ss.

Rudolph Lensch and Paul Leder, whose application for Letters Patent for an improvement in Metal Spray Gun, Serial No. 74,028, was filed in the United States Patent Office on April 13, 1936, being duly sworn, depose and say that they verily believe themselves to be the original, first and joint inventors or discoverers of the new and useful improvements in Metal Spray Gun, described and claimed in the annexed specification: that they do not know and do not believe that the same was ever known or used before their invention or discovery thereof: or patented or described in any printed publication in any country before their invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented in any country foreign to the United States on an application filed by them or their legal representatives or assigns more than twelve months prior to this application: and that no application for patent on said invention has been filed by them or their representatives or assigns in any country foreign to the United States.

And the said Rudolph Lensch does hereby state that he is a citizen of the United States and a resident of the City and County of Los Angeles, State of California,

And the said Paul Leder does hereby state that he is a citizen of Germany, and a resident of Alhambra, in the County of Los Angeles, State of California.

RUDOLPH LENSCH
PAUL LEDER

Subscribed and sworn to before me this 18 day of January, 1937.

BERTHA B. JOSEPH,
Notary Public in and for the County of Los Angeles, State of California.

Paper No. 6

Department of Commerce
United States Patent Office
Washington

Please find below a communication from the Examiner in charge of this application.

CONWAY P. COE,
Commissioner of Patents.

Jesse C. Martin, Jr.,
1325 Miller Drive,
Los Angeles, Calif.

Applicant: R. Lensch et al.
Ser. No. 74,028
Filed Apr. 13, 1936
For Metal Spray Gun

Responsive to amendment filed Jan. 21, 1937.

The drawings in this application are objected to by the Official Draftsman, as stated in the first office

action, in that the lines are rough and blurred in parts. The cost to remedy this defect in the drawings is six dollars. Since this application is otherwise in condition for allowance, this formal matter must be attended to before the case can go to issue. A prompt reply is requested.

H.S.

M. TAYLOR,
Examiner.

Paper No. 7

In the United States Patent Office
Div. 46
Room 4613

Applicants: Rudolph Lensch and Paul Leder
Serial No. 74,028
Filed April 13, 1936
For Metal Spray Gun

AMENDMENT

The Commissioner of Patents,

Sir:

Responsive to Official action of March 29th, 1937.

Please find herewith Post Office money order for six dollars to cover cost of remedying defects in drawings as pointed out by the Official Draftsman.

With the corrections made in the drawings, it is respectfully asked that the case be passed to early allowance.

Respectfully,

JESSE C. MARTIN, JR.,

Attorney.

April 13, 1937

Department of Commerce
United States Patent Office
Washington

Please find below a communication from the Examiner in charge of this application.

CONWAY P. COE,
Commissioner of Patents.

Jesse C. Martin, Jr.,
1325 Miller Drive,
Los Angeles, Calif.

Applicant R. Lensch et al.
Ser. No. 74,028
Filed Apr. 13, 1936
For Metal Spray Gun

In accordance with the provisions of Order No. 2308, dated March 12, 1917, which reads in part as follows:

* * * * *

Obvious informalities in the application may be corrected by the examiner, but said correction must be in the form of an amendment, approved by the Principal Examiner in writing, placed in the file, and made a part of the record. The changes specified in the amendment will be entered by the clerk in the regular way.

* * * * *

the changes, hereinafter specified, are made by the examiner in the application above identified.

Should these changes not be satisfactory to the applicant, appropriate amendment may be proposed under the provisions of Rule 78, provided the specification has not been printed.

The application has been amended as follows:

In Fig. 1 of the drawings, the reference numeral of the top wire feed gear has been changed to 35a and that of the lower gear changed to 34a to conform with the specification and the other figures of the drawings.

H.S.

M. TAYLOR,
Examiner.

Serial No. 74,028

Department of Commerce
United States Patent Office
Washington

June Four, 1937

Rudolph Lensch and Paul Leder,

Your Application for a patent for an Improvement in Metal Spray Gun filed Apr. 13, 1936 has been examined and Allowed with 4 claims.

The final fee, Thirty Dollars, With \$1 Additional for Each Claim Allowed in Excess of 20, must be paid not later than Six Months from the date of this present notice of allowance. If the final fee be

not paid within that period, the patent will be withheld, but the application may be renewed within one year after the date of the original notice with a renewal fee of \$30 and \$1 additional for each claim in excess of 20.

The office delivers patents upon the day of their date, on which date their term begins to run. The preparation of the patent for final signing and sealing will require about four weeks, and such work will not be begun until after payment of the necessary final fee.

When the final fee is paid, there should also be sent, Distinctly and Plainly Written, the name of the Inventor, Title of the Invention, and Serial Number as Above Given, Date of Allowance (which is the date of this circular), Date of Filing, and, if assigned, the Names of the Assignees.

If it is desired to have the patent issue to an Assignee or Assignees, an assignment containing a Request to that effect, together with the Fee for recording the same, must be filed in this office on or before the date of payment of the final fee.

After issue of the patent, uncertified copies of the drawings and specifications may be purchased at the price of Ten Cents Each. The money should accompany the order. Postage stamps will not be received.

The final fee will Not be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

Notice.—When the Number of Claims Allowed Is in Excess of 20, No Sum Less Than \$30 Plus \$1 Additional for Each Claim in Excess of Twenty Can Be Accepted as the Final Fee.

Respectfully,

CONWAY P. COE,
Commissioner of Patents.

Jesse C. Marin, Jr.,
1325 Miller Drive,
Los Angeles, Calif.

In Remitting the Final Fee Give the Serial Number at the Head of This Notice.

Uncertified Checks Will Not Be Accepted.

J. C. Martin, Jr.
Consulting Engineer & Patent Counsel
1325 Miller Drive
Los Angeles, California

September 13, 1937

Commissioner of Patents,
Washington, D. C.

Sir:

Herewith please find Post Office money order in the amount of \$30.00 for the payment of final fee covering application for Letters Patent of Rudolph Lensch and Paul Leder, Serial No. 74,028, filed April 13, 1936 and allowed per Official notice on June 4, 1937.

Respectfully,

J. C. MARTIN, JR.

JCMJr-B

[Printer's Note: Lensch Patent No. 2,096,119, appearing here in original File Wrapper, is omitted because it already appears in this printed record at page 56 as Plaintiffs' Exhibit No. 1.]

1936

CONTENTS

1. Application.....papers.
 2. Prts (3) Apr. 17, 1936
 3. Rejection Jul 20 1936
 4. Amdt A Jan. 21, 1937 (Jan 20 holiday)
 5. Letter & Sub. Oath Jan. 23, 1937
 6. Letter Mar 29 1937
 7. Letter to Dftsmn Apr. 14, 1937
 8. Ex Amdt. Jun 4-1937
-

[Printer's Note: The 3 drawings appearing here in Original File Wrapper are omitted because they are the same as those in Lensch Patent No. 2,096,119 (Plaintiffs' Exhibit No. 1) set out at pages 56 to 65 of this printed record.]

[Endorsed]: Deft's Exhibit A. Filed 4/30/40.

[Endorsed]: (Reporter's Transcript) Filed Dec. 15, 1941.

[Endorsed]: No. 10,000. United States Circuit Court of Appeals for the Ninth Circuit. Rudolph Lensch and Paul Leder, Appellants, vs. Metallizing Company of America, a corporation, L. E. Kunkler, Charles Boyden and Joseph Gossner, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 16, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
In and for the Ninth Circuit

No. 10000

RUDOLPH LENSCH and PAUL LEDER,
Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a
corporation, L. E. KUNKLER, CHARLES
BOYDEN,

Appellees.

APPELLANTS' CONCISE STATEMENT
UNDER RULE 19 (6)

I.

The District Court erred in giving judgment for the defendants, dismissing the complaint with prejudice with costs to the defendants.

II.

The District Court erred in not giving judgment for the plaintiffs as prayed for in the complaint.

III.

The District Court erred in narrowly construing the claims in suit of the patent and in finding such claims as so construed not to be infringed.

IV.

The District Court erred in its finding of fact (not numbered) that defendants' gun does not have an "open channel" or the "visibility" to the operator which plaintiffs' patented gun has.

V.

The District Court erred in its finding of fact (not numbered) that in the Mogul gun during operation only the outer end of the rear wire guide can be seen as it projects out of the body, that from the left hand, the side of the gear wheel attached to the upper feed wheel is visible, but it is hardly possible to see either the feed wheel itself or the moving wire, that it would be impracticable to attempt such an observation during operation, and that the feeding is not visible from the right hand side and it would be impossible to operate the gun and at the same time peer down from the top or front to see the wire passing into the combustion chamber.

VI.

The District Court erred in its finding of fact (not numbered) and its conclusion of law (not numbered) that to construe plaintiffs' patent claims as readable on defendants' device would be to give them a construction which would render the claims invalid on the prior art.

VII.

The District Court erred in its interpretation of the prior art patents and in its application of said prior art in the construction of the claims in suit of the patent.

VIII.

The District Court erred in not construing the claims in suit of the patent as valid when construed sufficiently broad to be infringed by defendants' device.

IX.

The District Court erred in not finding that the plaintiffs' patent in suit, as to the claims relied upon, to wit 2, 3, and 4, is infringed by defendants' device.

Dated: December 13, 1941.

HERBERT A. HUEBNER,

Attorney for Appellants.

520 Title Insurance Building,
Los Angeles, Calif. MI. 3821.

Received copy of the foregoing Statement of Points under Rule 19 (6) this 15 day of December, 1941.

WILLIAM R. LITZENBERG,
Attorney for Appellees.

[Endorsed]: Filed Dec. 16, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED UNDER RULE 19 (6)

1. Complaint, (as amended in Reporter's Transcript pages 4 to 6).
2. Answer.
3. Decision of the Court (filed June 14, 1941), omitting the illustrations therein.
4. Amended Order (filed June 24, 1941).
5. Findings of Fact and Conclusions of Law.
6. Judgment for Defendants (entered July 9, 1941).
7. Plaintiffs' exhibit 1.
8. The title page and page 16 of plaintiffs' exhibit 10A (omitting all pictures).
9. The title page and page 10 of plaintiffs' exhibit 10B (omitting all pictures).
10. The title page and pages 8, 9 of plaintiffs' exhibit 10C (omitting all pictures).
11. The title page and pages 2, 3 and 4 of plain-

tiffs' exhibit 10D (omitting all pictures and consolidation announcement of title page).

12. Defendants' exhibit A (omitting the patent, which is plaintiffs' exhibit 1).

13. Reporter's Transcript of Testimony, omitting the following:

Page 7, line 5, to page 11, line 22, both inclusive

Page 12, line 15, to page 15, line 13, both inclusive

Page 15, line 20, to page 23, line 20, both inclusive

Page 24, line 8, to page 25, line 13, both inclusive

Page 27, line 3, to page 35, line 10, both inclusive

Page 97, line 2, after "Mr. Litzenberg" to page 104, line 26, both inclusive

Page 105, sentence beginning in line 2, to page 109, line 19, both inclusive

Page 126, line 25, to page 128, line 17, both inclusive

Page 128, line 20, to page 129, line 11, both inclusive

Page 130, line 1, to page 132, line 9, both inclusive

Page 188, line 1, to page 229, line 15, both inclusive

Page 230, line 1, to page 269, line 10, both inclusive

Page 272, line 5, to page 297, line 21, both inclusive

14. Cost Bond on Appeal.
15. Notice of Appeal.
16. Appellants' Concise Statement under Rule 19 (6)
17. This Designation.

Dated: December 13, 1941.

HERBERT A. HUEBNER,
Attorney for Plaintiffs-Appellants,
520 Title Insurance Building,
Los Angeles, California.
Michigan 3821.

Received copy of the foregoing Appellants' Designation this 15 day of December, 1941.

WILLIAM R. LITZENBERG,
Attorney for Defendants-Appellees.

[Endorsed]: Filed Dec. 16, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF PARTS OF
THE RECORD TO BE PRINTED UNDER
RULE 19 (6)

1. The amendment to the Answer (Permitted by the Court)
2. Defendants' documentary Exhibit M (Bulletin 500 and the letter of March 17, 1934, to De Laval Pacific Co.)

3. Additional parts of the Reporter's Transcript of Testimony as follows:

Pages 97 to and including page 104.

Pages 130 to and including page 132.

Pages 188 to 229, all inclusive.

Pages 230 to page 269, inclusive.

Pages 270 to page 272, inclusive.

Pages 273 to 297, inclusive.

4. Plaintiffs' documentary exhibit No. 15 (Bulletin and letter).

WILLIAM R. LITZENBERG,

Attorney for Defendants-Appellees,
448 S. Hill St., Los Angeles,
California.

Dated: Dec. 16, 1941.

Received copy of the foregoing this 16 day of December, 1941.

HERBERT A. HUEBNER

By HAROLD C. CALDWELL,

Attorney for Appellants.

[Endorsed]: Filed Dec. 17, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the attorneys for the respective parties hereto that six copies of a book of exhibits of the prior art consisting of photostatic copies of foreign patents (Defendants' Exhibits B, C, D, E, and F) and printed copies of United States Letters Patents (Defendants' Exhibits G, H, I, J, K, and L) to be furnished by the United States Patent Office may be used in lieu of printing the same as part of the record on appeal of the above entitled matter.

Dated: Dec. 31, 1941.

HERBERT A. HUEBNER,
Attorney for Plaintiffs-
Appellants.

WM. R. LITZENBERG,
Attorney for Defendants-
Appellees.

So ordered:

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Filed Jan. 5, 1942. Paul P.
O'Brien, Clerk.

No. 10,000

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUDOLPH LENSCH and PAUL LEDER,

Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a corporation,
L. E. KUNKLER, CHARLES BOYDEN and JOSEPH GOSS-
NER,

Appellees.

APPELLANTS' OPENING BRIEF.

HERBERT A. HUEBNER,
520 Title Insurance Building, Los Angeles,

CONRAD C. CALDWELL,
830 Title Insurance Building, Los Angeles,

Attorneys for Appellants.

FILED

MAY 17 1942

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No. 10,000

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RUDOLPH LENSCH and PAUL LEDER,

Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a corporation,
L. E. KUNKLER, CHARLES BOYDEN and JOSEPH GOSS-
NER,

Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

The suit arises under the Patent Laws of the United States of which the District Court has exclusive original jurisdiction (Sec. 41 and 371, Title 28, U. S. C. A.). On January 13, 1939, appellants filed their complaint [Tr. 1] in the District Court of the United States for the Southern District of California, Central Division, alleging infringement of claims 2, 3 and 4 of Letters Patent No. 2,096,166, granted October 19, 1937, to plaintiffs for a metal spray gun, and praying for an injunction and accounting. On February 28, 1939, the defendants, appellees here (except Gossner, who was not served), filed their answer [Tr. 10] in the usual form denying infringement and attacking

the validity of the patent. On July 9, 1941 the District Court entered its judgment [Tr. 45] for the defendants, adjudging and decreeing that plaintiffs' patent No. 2,096,119 as to the claims in suit was valid but not infringed, and dismissing plaintiffs' complaint with prejudice and costs to defendants. Notice of appeal was duly filed October 8, 1941 [Tr. 47].

The appellant Paul Leder appears on the face of the patent as a German citizen, but has since become a naturalized citizen of the United States. Unless proof of such fact becomes for some unforeseen reason necessary, we rest the point with counsel's statement. We hereafter refer to appellants and appellees as plaintiffs and defendants, respectively, omitting Gossner from further consideration.

Statement of the Case.

On the issues framed by these pleadings, the case was tried before the late Hon. William P. James, and after his death was by stipulation and order transferred to Hon. Ralph E. Jenney. The opinion of the Hon. Ralph E. Jenney interpreting the scope of plaintiffs' said patent, and holding that as so interpreted the patent was valid but not infringed, was filed on June 14, 1941 [Tr. 18] and amended by minute order June 24, 1941 [Tr. 36]. The opinion is reported at 39 Fed. Supp. 838, 50 U. S. P. Q. 101. Findings of fact and conclusions of law were made under date of July 8, 1941 [Tr. 37]. Judgment for the defendants, from which this appeal is taken, was entered on July 9, 1941 [Tr. 45]. Notice of appeal was duly filed October 8, 1941 [Tr. 47].

The Patent in Suit.

1. BRIEF HISTORY OF THE METAL SPRAYING ART.

The patent in suit relates to a Metal Spray Gun. It has long been known that metal in the form of wire or powder could be heated to the melting point and sprayed upon any desired object. The metal spraying art underwent some development during the last World War, but it was not until 1920 that the process came into wide use. Contemporaneous with plaintiffs' invention, the art began to assume great commercial importance and continues to grow in popularity.

Before describing the various novel features and functions of plaintiffs' patented spray gun, it might be helpful to describe generally the process of spraying molten metal. The metal, usually in the form of a wire, is reduced to a molten state by means of acetylene gas and oxygen. The molten metal is then subjected to a blast or strong draft of air which tends to atomize the metal and direct it against the materials to be treated. The molten metal is fed in a continuous stream through the nozzle of the gun and is there seized upon by the air blast which, of course, is delivered separately from the gas and oxygen. The atoms or particles of the molten metal are microscopic in size after leaving the nozzle of the gun and in the molten state when they impinge upon the surface to be sprayed. The article which is to be treated is preferably roughened so that the molten metal may readily adhere thereto. The nozzle velocity of the spray gun is approximately 40,000 feet per minute. It is the combination of fast melting and properly synchronized feeding of the metal into the nozzle of the gun, together with the continuous blast of air, which assures a satisfactory process.

There is a wide range of uses and applications for the employment of the process. One of the most important commercial uses is the reclaiming of bearings and bushings in large motors.

There were various types of spray guns available prior to the invention of the patent in suit. Those guns possessed certain inherent defects and limitations. With them it was possible to spray molten metal, but no completely satisfactory use could be made of them, and likewise their use entailed certain hazards and dangers of explosion and backfire. That is repeatedly conceded by defendants' own witnesses. The metal spray gun invented by plaintiffs has solved many problems such as the factors of safety, light weight, ease and efficiency of operation, balance, and the facile and speedy replacement of parts which may have become damaged. It was the first gun designed so that all moving parts, such as ballbearings, worms, gears and shafts, run in a bath of suitable lubricant.

2. DESCRIPTION OF THE PATENTED DEVICE.

The various parts and features of plaintiffs' spray gun are amply described, set forth and claimed in the patent in suit. Further and detailed amplification of that description was rendered by Mr. Charles L. Stokes, plaintiffs' expert witness, at pages 302 *et seq.* of the transcript. Briefly, the patented gun and for that matter defendants' device as well, consists of two principal parts, which may be described as follows:

1. *Power Unit*, including the wire feeding mechanism, and
2. *Combustion Unit*.

The power unit and the combustion unit are releasably associated together at an abutment between the nozzle base of the combustion unit and the walls of the power unit casting.

One of the most important novel features of plaintiffs' patented device is the location of knurled wheels which deliver the wire, in an open channel between the wall of the turbine housing and the adjacent wall of the transmission housing.

The prior art is completely devoid of such features and assembly and teaches only the location of gears and turbine associated together in a box or ordinary casting, together with the wire feeding mechanism. In that type of construction, a backfire or explosion would obviously endanger the operator of the gun and would tend to destroy or damage the entire device.

In plaintiffs' gun, a fine balance is attained as aforesaid by locating a turbine housing on one side and a transmission housing on the opposite side, with a wire feeding mechanism located in the open channel between those two housings. In other words, the combustion unit is formed as a separate and distinct entity from the power unit, and should damage occur to it, a replacement thereof could be made at relatively little expense.

Another novel feature of plaintiffs' structure is the arrangement whereby any desired pressure may be exerted on the wire as it is fed through the wire feeding wheels. Slippage of the wire is thereby prevented.

Still another novel feature is the provision of a hinged latch construction whereby the top wire feeding wheel is releasably confined so that when in use it can be set to engaged the wire and thereafter be unlatched and lifted on its hinged connection.

It may be further noted that in the patented gun and in defendants' device there is a visible feeding of the wire. The open channel provided between the turbine housing and the transmission gear housing constitutes a definite and positive safety factor. If there is a backfire it will be dissipated in the air. The operator may also see the wire as it passes through the gun and thereby knows whether or not it is feeding properly. If for any reason the feeding should be impaired or should stop, the operator may immediately adjust the wire feed without shutting off the gun.

3. CLAIMS OF THE PATENT RELIED ON.

The claims in suit read as follows:

"2. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears, and wire feeding wheels, said member including housings for said turbine and gears and an open channel in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel, a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having control valves and a nozzle base, a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the com-

bustion unit, and means including an abutment between the nozzle base and the walls of said member for releasably confining said units in operative association whereby said wire feeding wheels are visibly disposed in said channel.

3. In a metal spray gun, a power unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing housings for said turbine and gears and having an open channel in its walls between said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate in said channel, the other of said wire feeding wheels being pivotally mounted on said member and adapted for rotation in said channel, and means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire.

4. A wire feeding mechanism for a metal spray gun comprising a member having a turbine, transmission gears, and a pair of wire feeding wheels, means for effecting the visible feed of wire through said wheels comprising: an open channel in the walls of said member between the turbine and gear housings thereof, a wire feeding wheel mounted between the sides of said channel and actuated by said transmission gears, a wire feeding wheel hingedly mounted on said member and adapted for rotation in said channel, and a spring latch for holding said hingedly mounted wire feeding wheel in engagement with said first wire feeding wheel during the feeding of wire."

4. COMMERCIAL SUCCESS.

Commercial success of the patented device has been established. Reference may be had to the testimony of Mr. Jesse C. Martin, Jr. [Tr. 353 *et seq.*] wherein he states that approximately 150 spray guns embodying the features of the patent in suit have been manufactured and sold to a great number of companies such as the Shell Oil Company, the Reading Railroad Company, the Aluminum Company of America, Detroit Edison Company, and others. The sales price of each gun was \$500.00.

It does not appear how many Mogul (trade name of the alleged infringing device) guns said to incorporate the features of the patented invention, defendants have sold to date. In one of the defendants' advertisements (Plaintiffs' Exhibit 10d), which bears the date of June and July of 1938, the Mogul device was referred to as the gun that was keeping 1500 plants busy. Mr. Boyden, one of the defendants, denied that 1500 Moguls had been sold but did admit that the number was quite substantial [Tr. 103]. The sales price of the Mogul gun was likewise \$500.00 [Tr. 132]. In that respect, it should be noted Mr. Boyden testified [Tr. 132] that the price of the defendants' old Metallizer gun which does not embody the patented invention, was \$250.00 or \$350.00. This is tantamount to saying that the Mogul gun is a vast improvement over the Metallizer, which Mr. Boyden admitted in substance on the witness stand, and the defendants' own advertising further substantiates.

The Defendants' Device.

1. HISTORY OF THE METALLIZER AND MOGUL SPRAY GUNS.

Prior to the invention of the patent in suit defendants manufactured what is known as the Metallizer gun (Plaintiffs' Exhibit No. 6). The defendant company was then known as the Metallizing Company of Los Angeles, and in 1932 became known as the Metallizing Company of America. Mr. Charles Boyden, a mechanical engineer by profession and Vice-President of the defendant company, testified at length [Tr. 106-115] regarding the features of the Metallizer gun, and in doing so admitted that it had certain inherent defects and limited functions; and that the Mogul gun (Plaintiffs' Exhibit No. 8) which was manufactured by defendant company after defendants had knowledge of the patented invention, was a much superior mechanism. The publication known as The Metallizer (Plaintiffs' Exhibits 10a-10d), Mr. Boyden states, could be considered as a house organ of the defendant company, and same repeatedly points out the superiority of the Mogul over the Metallizer.

No contention has ever been made that the Metallizer gun manufactured by defendants is an infringement of the patent in suit. In that structure, the gears and wire feed wheels were all contained in a type of box housing. Any backfire would destroy the gas and oxygen passages in the forward wall of the casting and render the gun totally unuseable. In addition, the fines from the wire would become dispersed in the interior of the housing and many of them would undoubtedly accumulate on the gears and would impair or retard the action thereof. Should the fuel

gas accumulate in the pocket in the lower part of the box, followed by a backfire, a destructive explosion would result.

2. DESCRIPTION OF THE ALLEGED INFRINGING MOGUL SPRAY GUN.

The defendants' Mogul gun (charged to infringe) is a substantial replica of the device of the patent in suit.

It generally comprises (1) a power unit including a wire feeding unit, and (2) a combustion unit. The defendants have repeatedly stressed the point in their advertising that the combustion unit is separate and distinct from the power unit, and that is one of the essential features of the patent in suit. The lower wire feeding wheel in the Mogul gun occupies the identical relationship that it does in the patent. The upper wire wheel operates in an open channel such as the patent discloses and the wire feeding is visible to the operator, which same advantage is derivable from use of the patented gun. In case of backfire, the open channel will permit the safe dissipation of the accumulated gases. In case of damage to the combustion unit, as in the patented structure, that unit may be removed and repaired or replaced at relatively slight expense, when compared with the repair or replacement of the entire gun, which would ordinarily be necessary in the case of damage to the Metallizer and to the spray guns of the prior art.

Mr. Boyden claims to have designed the Mogul gun [Tr. 106-115] and he thereafter admits, feature by feature and part by part, what amounts to complete physical and functional identity between the Mogul gun and the patented device. We shall more explicitly point out the nature of those admissions when we discuss hereinafter the subject of infringement.

The Question Involved.

The sole primary question on this appeal is whether the defendants' Mogul gun infringes claims 2, 3 and 4 of plaintiffs' U. S. Patent No. 2,096,119.

This question is raised on this appeal by reason of the trial court's judgment, supporting opinion and findings of fact and conclusions of law, wherein the patent was held valid but not infringed.

Subsidiary questions are presented in our specification of errors.

In the trial court the defendants contended, among other things, that there was a constructive abandonment of plaintiffs' invention prior to the application for patent. This issue was decided against the defendants and in favor of the plaintiffs [Tr. 22-25] by the court's opinion, and was not referred to in the findings of fact, conclusions of law, or judgment. The defendants took no cross-appeal, and the issue is therefore not involved in this appeal. Nevertheless, defendants caused a large amount of testimony to be printed which related solely to such issue, and which was unnecessary.

Specification of Errors Relied Upon.

I.

The District Court erred in giving judgment for the defendants, dismissing the complaint with prejudice with costs to the defendants.

II.

The District Court erred in not giving judgment for the plaintiffs as prayed for in the complaint.

III.

The District Court erred in narrowly construing the claims in suit of the patent and in finding such claims as so construed not to be infringed.

IV.

The District Court erred in its finding of fact (not numbered) that defendants' gun does not have an "open channel" or the "visibility" to the operator which plaintiffs' patented gun has.

V.

The District Court erred in its finding of fact (not numbered) that in the Mogul gun during operation only the outer end of the rear wire guide can be seen as it projects out of the body, that from the left hand, the side of the gear wheel attached to the upper feed wheel is visible, but it is hardly possible to see either the feed wheel itself or the moving wire, that it would be impracticable to attempt such an observation during operation, and that the feeding is not visible from the right hand side and it would be impossible to operate the gun and at the same time peer down from the top or front to see the wire passing into the combustion chamber.

VI.

The District Court erred in its findings of fact (not numbered) and its conclusions of law (not numbered) that to construe plaintiffs' patent claims as readable on defendants' device would be to give them a construction which would render the claims invalid on the prior art.

VII.

The District Court erred in its interpretation of the prior art patents and in its application of said prior art in the construction of the claims in suit of the patent.

VIII.

The District Court erred in not construing the claims in suit of the patent as valid when construed sufficiently broad to be infringed by defendants' device.

IX.

The District Court erred in not finding that the plaintiffs' patent in suit, as to the claims relied upon, to-wit, 2, 3, and 4, is infringed by defendants' device.

Summary of Argument.

Claims 2, 3 and 4 of the patent in suit are infringed by the defendants' Mogul gun.

1. An analysis of the elements of the claims compared with the prior art and construed with reference to the file wrapper discloses that the patent is entitled to a reasonable range of equivalents.

2. All elements of the claims are duplicated in the Mogul gun in the same relationship, and infringe the claims even when a narrow range of equivalents is accorded them.

3. Defendant Charles Boyden, vice president of the defendant corporation, and the designer of the Mogul gun, admitted that the Mogul gun embodies the novel features protected by the patent.

ARGUMENT.

POINT 1.

An Analysis of the Elements of the Claims Compared With the Prior Art and Construed With Reference to the File Wrapper Discloses That the Patent Is Entitled to a Reasonable Range of Equivalents.

SUMMARY OF PRIOR ART PATENTS:

One of the earliest applications of the art of spraying metals or other fusible substances is found in U. S. patent 1,128,175 issued February 9, 1915, to Erika Morf, a citizen of Switzerland [Def. Ex. J., Tr. 482-585]. Morf discloses merely the fundamental process of fusing and atomizing by a blast of air. No other details of structures are disclosed.

Morf was followed by British patent 268,431 issued to Metallization Limited in 1926 [Def. Ex. F, Tr. 460-462]. This is perhaps the first example of a metal spraying gun employing the principles disclosed by Morf which will operate with the use of wire or a solid rod. The patent discloses a metal spraying gun with a nozzle comprising concentrically disposed jets mounted by means of a union fitting on a housing, enclosing a set of wire feeding wheels. One of said wheels is adjustably mounted. The wire feeds through the housing and said wire feeding wheels. The power for driving said wheels is supplied by an air turbine disposed in a separate housing connected by means of a shaft and a set of transmission gears.

Next in time was patent 1,617,166 issued to Max Ulrich Schoop, a citizen of Switzerland on February 28, 1927 [Def. Ex. I, Tr. 478-480]. Following the general prin-

ciples disclosed by Morf, Schoop discloses a device for atomizing granulated material. It will be noted that Schoop is limited to the application of previously granulated or powdered material. It cannot be used on wire or glass rods. The only element disclosed by Schoop that is also contained in plaintiffs' gun is a nozzle comprising a series of concentrically disposed jets mounted by means of a union fitting. Since this feature is not claimed by plaintiffs as novel, it is of no practical importance here.

Schoop was followed by French Patent No. 639,039, issued to Societe Nouvelle de Metallisation, June 9, 1928 [Def. Ex. D, Tr. 450-456]. The patent declares it to be an improvement on and applicable to the "Schoop" gun. This patent discloses a spray gun designed to operate with solid ammunition in the form of wire or rods. It incorporates a nozzle comprising concentrically disposed jets and a housing, containing the wire feeding mechanism. The wire feeding mechanism comprises a set of oscillating jaws or a rotating screw operated by compressed air. The wire feeds through a closed housing.

A further improvement upon the "Schoop" gun is contained in French Patent No. 680,554, issued to Societe Nouvelle de Metallisation, May 2, 1930 [Def. Ex. C, Tr. 443-447]. This patent discloses an air driven turbine geared to a pair of knurled wire feeding wheels. The gun is entirely enclosed by a housing but provides the first example of a partition between the wire feeding wheels and the transmission wheels. One of the feed wheels is adjustably pivoted.

U. S. Patent 1,776,632 issued to Rudolph Lensch and Paul Leder, Sept. 23, 1930 [Def. Ex. L, Tr. 491] discloses the detailed construction of a metalizing gun of the

closed box type. A pair of wire feeding wheels within the closed box are driven by an air turbine, through the medium of a set of transmission gears. No novelty or advancement over the prior art is claimed for the construction of the gun. The novelty and claims are directed to the details of the combustion nozzle only.

The next step in the improvement of the art appears in French Patent 741,740 issued to Porchere and Jourde, Feb. 18, 1933 [Def. Ex. B, Tr. 430-440]. This gun is similar to French Patent No. 680,554 in that the gun is entirely enclosed by a housing and having a pair of wire feeding wheels, one of which is adjustably mounted. The wire feeding wheels are driven by a set of transmission gears. However, this patent introduces an electric motor as the driving mechanism in place of an air turbine.

U. S. Patent 1,917,523 issued to Andrew D. Irons, July, 1933, discloses a closed box type of gun having a turbine drive, transmission gears, and wire feeding wheels, one of which is pivotably mounted for adjustment. The patentable novelty of Irons lies only in the construction of the combustion nozzle. Since the construction of the nozzle is not included as a part of claims 2, 3 and 4 of plaintiffs' patent, a discussion of it here would be idle.

British Patent No. 440,248 issued to Heinrich Schlupmann Dec. 23, 1935 [Def. Ex. E, Tr. 458] discloses a closed box, electric motor driven metal spray gun. The novelty of Schlupmann lies in the fact that he provides an offset rotating nozzle for spraying the interior of hollow objects. The wire is fed through the closed housing.

The first example of a visible feed is to be found in U. S. Patent 1,987,016 issued to Rudolph Lensch and Paul Leder, Jan. 8, 1935 [Def. Ex. K, Tr. 488]. This

patent discloses and claims a metal spray gun comprising a combustion nozzle, a housing with an air driven turbine and transmission gears disposed within said housing, a pair of wire feeding wheels disposed on shafts extending externally of the housing and being fully visible during operation. One of the wire feeding wheels is pivotally mounted. It will be noted that the turbine and gear housings are on the same side of the gun, resulting in a gun which is off balance. There is no channel between the two housings.

The last step in development of spray guns, prior to the patented gun of the plaintiffs, is to be found in U. S. Patent 2,102,395 issued to Thomas S. Valentine and Edward J. Brennon, Dec. 14, 1937 [Def. Ex. G, Tr. 464]. Valentine *et al.* discloses a closed box type of metal spray gun, introducing an improved combustion nozzle and an external or distant power drive.

The scope to be accorded plaintiffs' claims will now be seen from the following analysis:

COMPARISON OF ELEMENTS IN PATENT CLAIMS WITH DISCLOSURES IN PRIOR ART:

Patent Claims Subdivided	An Element Meeting Language of a Phase of the Claim First Disclosed by
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Claim 2. In a metal spray gun

(1) A Power unit comprising a member adapted to carry a turbine, transmission gears and wire feeding wheels, said member including	British Patent 268,431 Exhibit F
--	----------------------------------

Patent Claims Subdivided	An Element Meeting Language of a Phase of the Claim First Disclosed by
(a) a housing for said turbine gears and	British Patent 268,431 Exhibit F
(b) an open channel in its walls exteriorly of said housing, said wheels being adapted for rotation in said channel,	None
(2) A combustion unit comprising a member adapted to carry combustible gases and compressed air, and having	British Patent 268,431 Exhibit F
(c) control valves	Schoop 1,617,166 Exhibit I
(d) a nozzle	Morf 1,128,175 Exhibit J
(e) a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit, and	Morf 1,128,175 Exhibit J
(f) means including an abutment between the nozzle base and wall of said member for releasably confining said units in operative association whereby	None
(g) said wire feeding wheels are visibly disposed in said channel.	None

Patent Claims Subdivided	An Element Meeting Language of a Phase of the Claim First Disclosed by
--------------------------	--

Claim 3. In a Metal Spray Gun

- | | |
|--|--|
| (1) A power unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing | British Patent 268,431 Exhibit F |
| (a) a housing for said turbine and gears having | British Patent 268,431 Exhibit F |
| (b) an open channel in its walls between said housings | None |
| (c) One of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and | Lensch <i>et al.</i> 1,776,631 Exhibit L |
| (d) adapted to rotate in said channel, | None |
| (e) the other of said wire feeding wheels being pivotally mounted on said member and | British Patent 268,431 Exhibit F |
| (f) adapted for rotation in said channel, and | None |
| (g) means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire. | British Patent 268,431 Exhibit F |

Patent Claims Subdivided	An Element Meeting Language of a Phase of the Claim First Disclosed by
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Claim 4. A wire feeding mechanism for a metal spray gun, comprising

(1) a member having a turbine, transmission gears, and a pair of wire feeding wheels comprising:	British Patent 268,431 Exhibit F
--	----------------------------------

(a) an open channel in the walls of said member between the turbine and gear housing thereof	None
--	------

(b) a wire feeding wheel mounted between the sides of said channel and	None
--	------

(c) actuated by said transmission gears.	British Patent 268,431 Exhibit F
--	----------------------------------

(d) a wire feeding wheel hingedly mounted on said member and adapted for	British Patent 268,431 Exhibit F
--	----------------------------------

(e) rotation in said channel, and	None
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(f) a spring latch for holding said hingedly mounted wire feeding wheel during the feeding of the wire.	Lensch et al. 1,776,631 Exhibit L
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The foregoing table of comparison is useful in obtaining a general idea of the novelty contributed by the patent in suit over representative prior art. Since, however, the patent claims cover combinations, and the combinations are nowhere found in the prior art, the claims are to be construed even somewhat broader than this comparative table indicates, because the separated elements which appear by their language to read on prior patents are actually modified by the particulars defining novelty. Therefore, a complete picture of the scope of the patent, is correctly seen from a summary of the combination as a whole, which follows:

SUMMATION OF NOVEL COMBINATION IN PLAINTIFFS'
PATENT:

In summation, plaintiffs' expert witness, Mr. Stokes, discusses [Tr. 341 *et seq.*] part by part the features of the patent in suit which, in combination, he finds to be novel over all of the prior art disclosures. He enumerates the parts and features as follows: The casing of the power unit comprises a gear train housing on one side and a turbine housing on the other side, between which is an open channel for the wire feeding wheels. In the front is a combustion unit carrying air and gas passages. The combustion unit is readily detachable from the power unit and is adapted to fit on a shoulder [abutment] towards the front of the power unit so that wire being fed through same will be fed on a straight line which passes through

the open channel between the walls of the turbine housing and the gear housings and rear wire feeding wheels rotatably disposed in the said channel. The upper wire feeding wheel is pivotally mounted on the upper part of the power unit and adjustably held under tension during operation of the gun so as to hold it in tension with the wire being driven forward by the lower wheel. The open channel functions to dissipate any backfire in the open air and extends through the power unit. The open channel likewise prevents the collection of dust and fines and thereby eliminates any undue wear of the wire feeding wheels or other gears.

In discussing the above novel features of the mechanism of the patent in suit, and anent infringement, the witness emphatically stated that all of such features were present in the defendants' structure.

THE FILE WRAPPER:

Plaintiffs do not differ with the District Judge's analysis of the limitation of an **open channel** imposed by the file wrapper, but contend that his application of the limitation found therein to the defendants' gun was more restricted than a reasonable range of equivalents should allow.

Irons No. 1,917,523 (Ex. H), one of the file wrapper references cited, and indeed all box type spray guns, of necessity embody a channel or passageway for the passage of the wire.

It is conceded that when plaintiffs cancelled their original claim as being anticipated by Irons, and submitted new claims wherein they claimed an *open* channel between the adjacent walls of the turbine and transmission housings, plaintiffs limited themselves to such a channel. It is respectfully submitted, however, that limiting the claims to an open channel between the walls of the turbine and transmission housings, does not and should not restrict plaintiffs to the precise degree of visibility that is displayed in plaintiffs' gun. Plaintiffs are entitled to a reasonable range of equivalents based on the language of the claims, and permitted by the prior art. Claim 3 does not even mention visibility, and claims 2 and 4 do not define the *degree* of visibility.

Within a reasonable range of equivalents, plaintiffs contend the defendants' gun embodies an open channel between the adjacent walls of the turbine and transmission housings, as discussed in more detail in the next section of this brief.

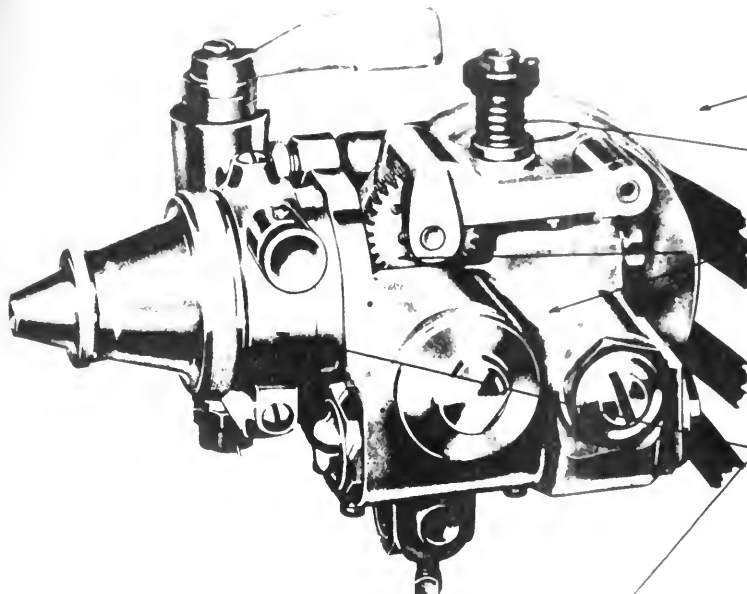
POINT 2.

All Elements of the Claims Are Duplicated in the Mogul Gun in the Same Relationship, and Infringe the Claims Even When a Narrow Range of Equivalents Is Accorded Them.

The best exposition of this is found in the illustrations which are inserted here in our brief. The patent claims are subdivided in the same manner as when comparing them with the prior art, and arrows are drawn from such elements to the corresponding element in the Mogul gun. These illustrations are believed to be much more helpful to this Court than a descriptive comparison, and our case stands on the conclusions to be drawn therefrom.

(Photostats.)

In a metal spray gun,



(1) a power unit comprising a member adapted to carry a turbine, transmission gears, and wire feeding wheels, said member including

(a) housings for said turbine and gears and

(b) an open channel in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel,

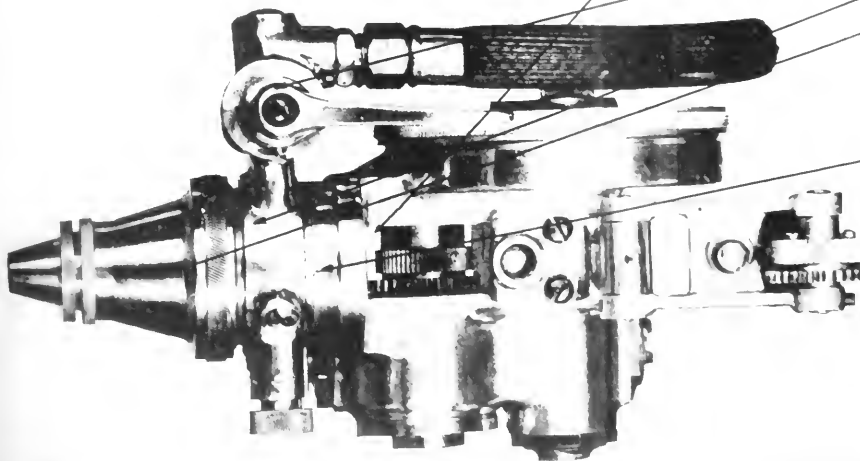
(2) a combustion unit comprising a member adapted to carry combustible gases and compressed air, and having

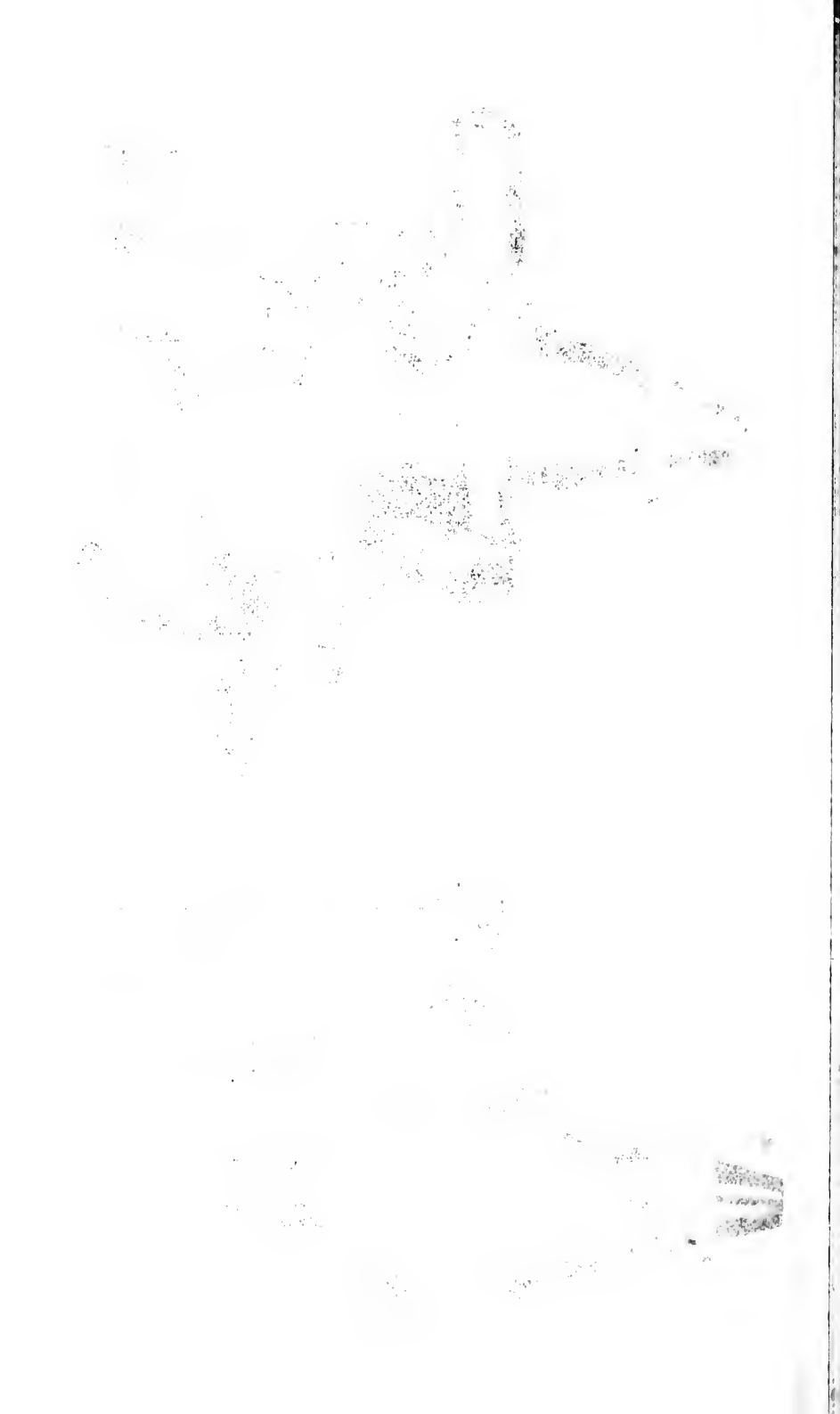
(c) control valves and

(d) a nozzle base,

(e) a metal spraying nozzle secured to said base and adapted to receive the gases and compressed air of the combustion unit, and

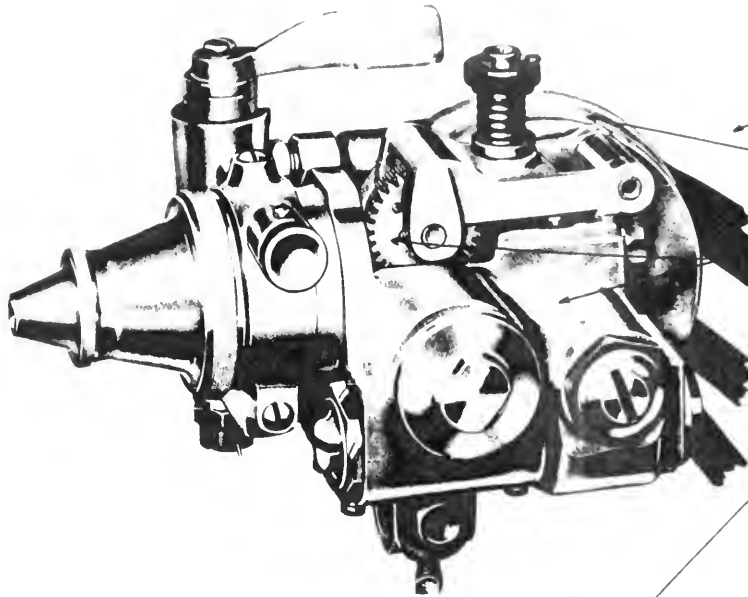
(f) means including an abutment between the nozzle base and the walls of said member for releasably confining said units in operative association whereby said wire feeding wheels are visibly disposed in said channel.





CLAIM 3.

In a metal spray gun,

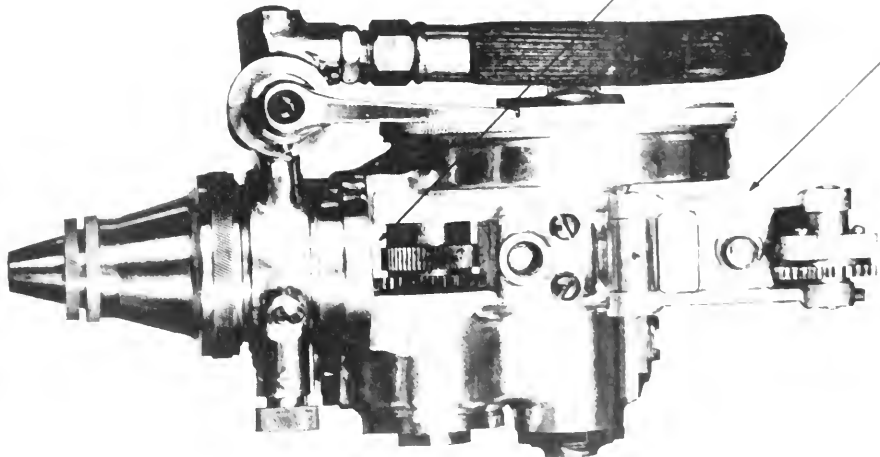


(1) a poser unit comprising a member adapted to carry a turbine, transmission gears and a pair of wire feeding wheels, said member providing

(a) housings for said turbine and gears and having

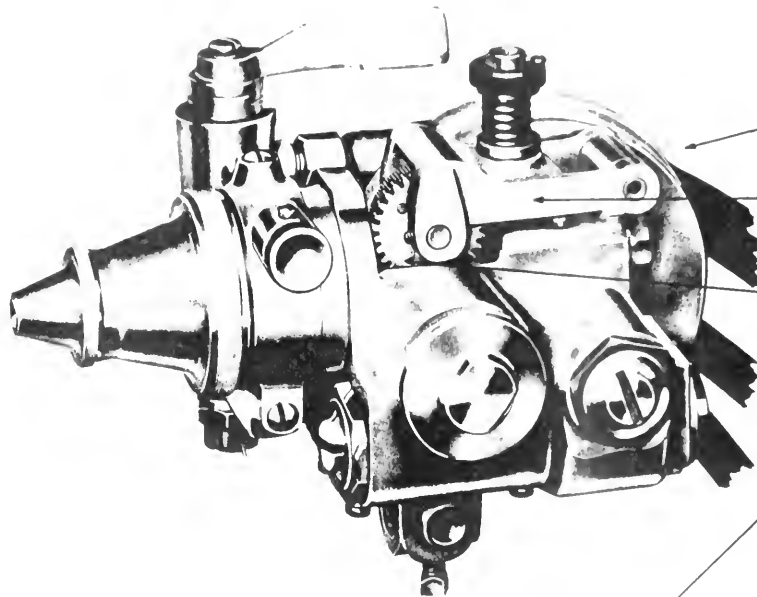
b) an open channel in its walls between said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate in said channel, the other of said wire feeding wheels being pivotally mounted on said member and adapted for rotation in said channel, and

(c) means for holding the said wire feeding wheels in cooperative engagement during the feeding of wire.



CLAIM 4.

A wire feeding mechanism
for a metal spray gun,
comprising



(1) a member having
a turbine, trans-
mission gears,
and a pair of
wire feeding
wheels,

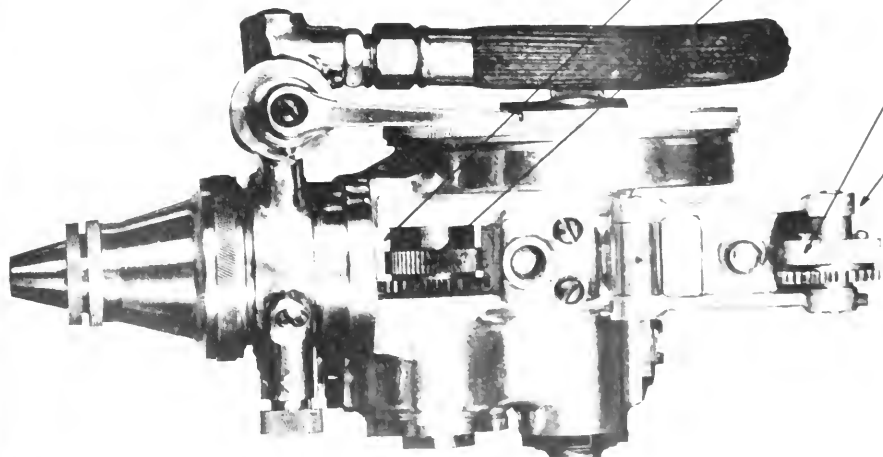
(a) means for
effecting the
visible feed of
wire through
said wheels
comprising:

(1) an open channel
in the walls of
said member be-
tween the turbine
and gear housings
thereof,

(2) a wire feeding
wheel mounted
between the sides
of said channel
and actuated by
said transmission
gears,

a wire feeding
wheel hingedly
mounted on said
member and adapted
for rotation in
said channel, and

(4) a spring latch for
holding said hingedly
mounted wire feeding
wheel in engagement
with said first wire
feeding wheel during
the feeding of wire.





POINT 3.

Defendant Charles Boyden, Vice President of the Defendant Corporation, and the Designer of the Mogul Gun, Admitted That the Mogul Gun Embodies the Novel Features Protected by the Patent.

This case affords a striking example of deliberate piracy. Defendants carefully studied plaintiffs' invention and thereafter changed the design of the metallizing gun previously manufactured by them and incorporated each and every feature of plaintiffs' invention.

Such a claim is not based alone on the conclusion of plaintiffs but upon a direct and unequivocal admission by Mr. Boyden, the designer of the accused gun and vice president of defendant corporation.

Mr. Charles Boyden under examination by plaintiffs' counsel made statement after statement which, when considered together, amount to nothing less than a complete and unequivocal admission of infringement. In the first place, he plainly stated that the Metallizer gun manufactured by defendants possessed certain inherent defects which were overcome by the Mogul gun which was designed and constructed approximately four years after manufacture was begun of the Metallizer. At page 125 *et seq.* of the transcript, Mr. Boyden speaks of the deficiencies of the Metallizer gun and the superior qualities of the Mogul mechanism. Briefly, the superior features may be enumerated as follows: The operation is speedier or, in other words, the Mogul sprays more metal in a given time. The Mogul is more durable [Tr. 128]. There is the advantage of segregating the wire feeding wheels so that the fines do not foul the gears. There is the advantage of the open channel [Tr. 128], the separation of

the combustion and power units or, as referred to in the Metallizer Midwinter Issue for January, 1936, the

“complete separation of the gas head and wire feeding mechanism is an assurance against combustible gas mixtures working back into the enclosed gear case through gas mixing channels drilled in the gear case proper.” [Tr. 130; Plf. Ex. 10a, Tr. 77.]

Less expensive replacement cost, better combination of metals, elimination of backfire hazard or gas accumulation [Tr. 130], elimination of explosion because of leakage by reason of the open channel which would permit the fire to dissipate in the air [Tr. 130].

Mr. George Stanley Udell, one of plaintiffs' witnesses, corroborated Mr. Boyden in part on the various advantages attained by the Mogul mechanism over the earlier Metallizer [Tr. 137-139].

During the four year interval between the manufacture of the Metallizer and the Mogul guns, defendants had available and made a close study of plaintiffs' invention which materialized in the patent in suit. That is plainly admitted by Mr. Boyden from whose testimony we quote as follows [Tr. 211]:

“Q. By Mr. Huebner: I believe you testified on direct examination Mr. Boyden, that you knew of the Lensch and Leder patented gun before you designed the Mogul, and that you had seen circulars of the gun? A. That is true.”

The witness then strangely denied receiving any help from those “circulars,” although he admitted looking at the “circulars” [Tr. 213] and also again when he stated:

“A. We no doubt studied the circulars. We studied all competitive equipment circulars.

Q. Didn't you study the plaintiffs' circulars of the patented gun very closely in order to gain knowledge or information from them as to the construction of the gun? A. **I no doubt did, as to the construction of the gun.**" [Tr. 213.] (Emphasis ours.)

It is true that the witness immediately followed that admission by stating he obtained no ideas from the circulars, but that is discounted by the facts in this case which clearly show that the Metallizer gun previously manufactured by defendants was of a construction different from that of the teachings of the patent in suit, while the Mogul gun adopted some four years later and after a disclosure to defendants by means of plaintiffs' circulars had been made, *incorporated part by part and feature by feature the construction of plaintiffs' invention.*

Under direct examination of plaintiffs' counsel, Mr. Boyden in effect admitted complete and unequivocal infringement of the patent in suit and in doing so bound not only himself but the Metallizing Company of America and the other defendants as well, on the basis that he gave practically all of his attention to mechanical problems of the company and "designed" the Mogul gun in question [Tr. 106].

Mr. Boyden pays tribute to plaintiffs' patented invention by repeatedly admitting that the Mogul gun which embodies the same structural details as disclosed in the patent in suit possessed superior qualities to previous spray guns, including the Metallizer. He says that it is impossible for gas to accumulate in the gear case and that no backfire will occur [Tr. 101].

The witness admits that the so-called gas head assembly of the Mogul gun could properly be designated the com-

bustion unit and that the wire feeding assembly might be called the power unit. *Likewise, that the Mogul gun possesses an opening or channel between the two housings which communicates with the atmosphere and that the wire feeding wheels operate in said channel.* Further, that said wire feeding wheels are aligned with a wire guide for directing and propelling wire through the gun and into the nozzle for further operation. That melting occurs in the nozzle of the gun and the molten metal is atomized and blasted by means of air pressure; that the upper wire wheel in the Mogul gun is mounted on an axis or pivoted arm which may be adjusted as desired [Tr. 107-110]; that the lower wire wheel in the Mogul gun is mounted in the channel and on a continuation of the shaft; that the lower wire wheel is driven by means of power derived from the turbine and communicated through gears on to the shaft of the wheel; that the upper wheel is an idler and tension thereof may be regulated by means of a spring and screw arrangement; that the combustion unit or so-called gas head of the Mogul gun is completely removable from the power unit or so-called wire feeding assembly [Tr. 107-110].

We have in the testimony referred to, an admission of complete infringement, feature by feature, of the patent in suit.

The witness immediately thereafter admitted that he was familiar with the patent in suit and that in answering the questions which we have paraphrased he was aware that plaintiffs' counsel was appropriating language both from the patent in suit and defendants' own advertising literature and using it synonymously and that the gas head assembly and combustion unit and also the power unit and

wire feed assembly nomenclature was used interchangeably [Tr. 111].

Further admissions of the witness in respect to infringement are as follows: He admitted that the defendants' structure and the patented device both operate to spray molten metal; that they use the same kind of wire and that they perform that function by the introduction of wire through a rear wire guide and the ejection of the wire through a forward wire guide. We would direct this Court's attention to the following words of the witness [Tr. 111-112]:

"A. They both work the same.

Q. Maybe you are willing to admit they are identical in construction and in operation and in results? A. I would say the results are the same and they operate very closely the same and in structure there is some difference.

* * * as far as the operation goes, it is exactly the same * * *.

Q. * * * You concede that the patented gun and the Mogul gun operate in exactly the same way?

A. They do.

Q. To produce exactly the same results? A. They do.

Q. And that the structure is just about the same, except that you observe some little differences? A. That is right."

Thereafter, the witness was compelled to retract his previous statement respecting a difference in structure which he had indicated was the arrangement of parts whereby the wire could be seen passing through the feed rolls of plaintiffs' device while in the Mogul gun such was

not the case. When questioned as to any other purported differences in structure, the witness said [Tr. 114]:

“Q. By Mr. Huebner: Is there any other feature that is different? A. Well, just a difference in the arrangement of parts. Outside of that I don’t see any great difference.”

Again speaking of those so-called differences, other than the visibility of the wire, the witness stated [Tr. 115]:

“* * * but that is all matter of design. It don’t amount to anything.

Q. By Mr. Huebner: It is not really a distinction— A. No. This one [the Mogul tensioning member] swings back.

Q. That is one of the details of this part of the combustion unit and this part is not a real distinction, is it? A. No. It is just a matter of we liked it this way, and the other gentlemen liked it that way.”

It is elementary to point out that a rearrangement or reorganization of parts which in the present case is really quite insignificant, cannot and does not avoid infringement where the structure, mode of operation or function, and results remain substantially the same. That is unmistakably true of the cause at bar.

Again the witness refers to what he terms the visibility of the wire in the patented structure and then admitted [Tr. 115]:

“Q. I think you said that aside from that there is no other difference worth noting? A. Nothing of importance.”

We thus come to the point in the case where one of the defendants, vice-president of the defendant company and the self acknowledged designer of the Mogul gun, has plainly and repeatedly admitted that the only possible distinction or difference between the structures is the degree of wire feed visibility. Witness' attention was thereafter directed to a specimen of the Mogul gun (Plaintiffs' Exhibit No. 8) and this colloquy occurred [Tr. 116]:

"Q. If you look in right there, can't you see the wire going into the feed rolls? A. I don't know.

* * * * *

Q. Looking from the left side of the gun, isn't it wholly possible to see the feed wire both at the rear part of the feed roll and the forward part of the feed roll as it is passing through the gun? A. It can be seen at the rear and also the front.

Q. Looking from the side of the gun, from the top of the gun? A. Yes, or from the top of the gun, you see it in front.

Q. And from the side of the gun you can see both the front and rear of the feed rolls, can't you? A. Here, yes.

Q. That is, from the side of the gun? A. Yes, you can see the wire.

Q. Both places? A. Both places."

The fact is plainly observable by operation or inspection of the patented gun and the Mogul gun, that the wire as it proceeds through the feed rolls is visible from the back as well as the front in the former structure, and from the

top and sides in the latter. It is a distinction without a difference and does not at all affect the admitted and plainly self-evident similitude between the two structures as to construction, mode of operation, and results. *The admissions of defendant constitute a full and complete admission of infringement which scarcely leaves that issue open to controversy.* As a matter of fact, the witness did not consider the visibility feature as of any importance. His concession in that regard—strangely enough brought out by his own counsel—is as follows [Tr. 120]:

“Q. Do you consider the visibility feature as of any importance in designing the Mogul machine?
A. No, otherwise I would have opened it up so you could see it.”

If there is any possible doubt about this phase of the case, we would refer this Honorable Court to the testimony of plaintiffs' expert, Charles L. Stokes [Tr. 340 *et seq.*], wherein a full exposition of this matter is made, the conclusion being that no substantial or even colorable difference exists between the patented structure and the Mogul gun. Moreover, the only claims which specify visibility are Claims 2 and 4 which say (terminal portion thereof):

“* * * whereby said wire feeding wheels are visibly disposed in said channel.”

It was pointed out by Mr. Stokes [Tr. 364] that the word used is “visible” and no mention is made of “total visibility” or “partial visibility,” or any other qualification or limitation. Claim 3 does not mention visibility.

DEGREE OF VISIBILITY WAS ERRONOUSLY CONSTRUED AS
CONTROLLING.

We quote from the opinion of the District Court [Tr. 32-33]:

"In plaintiff's gun visibility during operation is always present. The wire feed wheels are visible from the rear, and the righthand side: the construction giving bearings for both ends of the shafts without using the closed box type of body. In the Mogul gun, during operations, only the outer end of the rear wire guide can be seen as it projects out of the body. From the left hand, the side of the gear wheel attached to the upper feed wheel is visible, but it is hardly possible to see either the feed wheel itself or the moving wire. Certainly it would be impractical to attempt such an observation during operations. The feeding is not visible from the righthand side and it would be impossible to operate the gun and at the same time peer down from the top or front and see the wire passing into the combustion chamber."

These conclusions respecting the visibility in the Mogul gun are erroneous. It is possible that such misconception arose from the fact that the judge who decided the case did not hear the evidence, and had no opportunity to see the demonstrations and observe the handling of the gun by the witness.

Defendants' counsel laid much stress upon and built their entire defense of non-infringement around one point, viz., that the wire feeding wheels of the Mogul gun are not as visible from the rear as they are in the plaintiffs' gun, this in the face of Mr. Boyden's admissions that the difference was inconsequential. The District Court ap-

parently accepted this premise. and in such respect committed its primary error.

A moment's reflection will realize the fallacy of such a defense and that, even admitting the truth of such an assertion. the charge of infringement is not avoided.

Defendants by the complaint are charged with infringement of claims 2, 3 and 4 of the patent in suit, not with copying plaintiffs' commercial embodiment of the patented gun. By the evidence it appears that defendants had plaintiffs' commercial gun as a model, and they appropriated all of the essential features, although not extracting the full degree of visibility exemplified by plaintiffs' commercial gun. It is true that this commercial gun follows the details of the patent drawings, and to such extent, but that that extent only, is illustrative of the patent. It does not restrict the claims any more than the patent drawings themselves do. It is merely an example of what the patentees consider to be the best embodiment of the claims.

Claim 2 defines: "wire feeding wheels are visibly disposed in said channel."

Claim 3 makes no mention of "visibility."

Claim 4 defines: "means for effecting the visible feed of wire through said wheels."

Where in any of these claims is there any hint or claim to perfect visibility: or that the visibility specified is limited to visibility from the rear? Nor is any such limitation imposed by the prior art or by the file wrapper.

Defendants make no contention that the wire feed rolls are not of equal visibility from the *top* and *front* of the

accused Mogul gun, as they are in the patented gun. An examination of the Mogul gun will disclose why such a contention was not and could not have been made. The visibility of both guns is the same.

A proper understanding of the purpose and advantages of the "visibility" claimed by the patent reveals that the essence of the "visibility" defined in two of the claims refers to the open space between the feed rolls and the orifice of the combustion nozzle and not the opening leading into the feed rolls from the rear.

All closed box type spray guns were subject to two serious disadvantages. If combustible gas accumulated in the box, an explosion could follow which would wreck the gun and seriously injure the operator. An *open channel* immediately behind the combustion head renders such an explosion impossible. The other serious disadvantage lay in the fact that any irregularities in the surface of the wire would tend to cause the wire to "ball-up" *between the feeding wheels and the combustion head* causing expensive shut downs and delays. To be able to see the wire feed into the rolls is of no substantial importance. Even if the rear view were completely blocked, as it was in the earlier closed box types, so long as the operator sees the wire feeding into the box, he knows the operation of the gun is satisfactory up to and through the wheels—he does not need to actually see the wheels turn. However, the mere fact that the wire is feeding into the gun does not mean that it will continue on through the combustion head; it may "ball up" between the feed wheels and the combustion head. *It is at this point that the importance of visibility lies.* It is much the same as trying to push a piece of thread through the eye of a needle. It

would be folly to watch the thread on the near side of one's finger, rather than watching to make sure the thread did not bend between the fingers and the eye of the needle.

It was upon such argument that the patent in suit was granted. In this light, there can be no doubt that defendants' Mogul (Plf. Ex. 8 embodies the visible feed required to sustain a charge of infringement of claims 2 and 4.

A SECONDARY PATENT IS ENTITLED TO A REASONABLE RANGE OF EQUIVALENTS.

The Supreme Court of the United States and the Circuit Court of Appeals for the Ninth Circuit have repeatedly held that a secondary patent is entitled to a reasonable range of equivalents and that the invention should not be rendered practically worthless by restrictive and artificial rules of interpretation.

The patent should be construed in such a way as to secure to the inventor the fruits of his genius. In the case of the *Portland Telegram et al. v. New England Fibre Blanket Co.*, 38 Fed. (2d) 780 (C. C. A. 9, 1930), Circuit Judge Dietrich, in speaking of a secondary patent states (at page 782):

"Their invention undoubtedly marks a substantial advance in the art, and their patent is to be given a reasonable construction so as to secure to them the reward to which they are entitled."

If the two devices do the same work in substantially the same way, and accomplish substantially the same result, they are "mechanical equivalents."

In the recent Ninth Circuit case of *Wire Tie Machine Co. v. Pacific Box Corporation*, 102 Fed. (2d) 543 (C. C. A. 9, 1939), the Honorable Judge Stevens said:

“As pointed out above, the '260 patent is not limited to a narrow range of equivalents. We think that the Eby machine does do the same work as Parker '260, in substantially the same way, and accomplishes substantially the same result, and therefore can be said to be the equivalent of '260. * * *”

“Parker '260” referred to by Judge Stevens was patent No. 1,875,260 for an improvement in a wire tying machine. The District Court's opinion holding there was no infringement was reversed.

This view of secondary or improvement patents has been concurred in by the Second Circuit, which has held that even though in view of the prior art, a patent is a narrow one, it should not be so limited in equivalents as to render the invention practically worthless.

Art Metal Works v. Abraham & Straus, 107 Fed. (2d) 940 (C. C. A. 2, 1939).

See also:

Klein v. Russel, 19 Wall. (86 U. S.) 433, 22 L. Ed. 116;

Topliff v. Topliff, 145 U. S. 156, 36 L. Ed. 658;

Smith v. Snow, 294 U. S. 1, 79 L. Ed. 72.

A change in degree, or sacrifice of some of the advantages of the patented structure does not avoid infringement.

A SLIGHT AND UNIMPORTANT MODIFICATION WILL NOT
AVOID INFRINGEMENT.

“True, plaintiff’s invention is not primary, but their patent cannot be rendered worthless by a mere evasion of the exact letter thereof through slight and unimportant modifications of the essential elements.”

Bankers’ Utilities Co. v. Pacific Nat’l Bk., 32 Fed.
(2d) 105, 107 (C. C. A. 9, 1929).

Conclusion.

The District Court erred in reading into claim 3 a visibility of the wire feeding wheels, and in holding that claims 2, 3 and 4 must all be limited to a visibility of the degree illustrated by the patent drawings and plaintiffs’ commercial gun, and that, as so construed, the claims are not infringed by the defendants’ Mogul gun.

The prior art does not disclose a metal spray gun having balanced housings for turbine and gears, with a channel between adjacent walls of these housings, and wire feeding wheels operating in the channel, the channel being open for dissipation of gases and wire fines, and permitting inspection of the wire being fed into the combustion head. Nor does the prior art disclose an abutment upon which the combustion head is detachably mounted. These features are described in the claims and are all present in the defendants’ Mogul gun.

Infringement therefor occurred, and the judgment of the trial court should be reversed, with directions to enter

a judgment finding infringement, and ordering an injunction and accounting of damages and profits.

This Court is also requested to make a special allowance to the plaintiffs for costs incurred in printing the unnecessary parts of the record pursuant to defendants' designation.

Respectfully,

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CONRAD C. CALDWELL,

Attorneys for Appellants.

Los Angeles, Calif., March 9, 1942.

No. 10,000

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUDOLPH LENSCH AND PAUL LEDER,

Appellants.

vs.

METALLIZING COMPANY OF AMERICA, a corporation, L. E.
KUNKLER, CHARLES BOYDEN and JOSEPH GOSSNER,

Appellees.

APPELLEES' BRIEF.

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Appellees.

APPELLEES' BRIEF.

Jurisdiction.

The jurisdiction, in all respects, is conceded by appellees.

The Trial.

The Court to whom this case was assigned for study and decision after the trial, and after the sudden death of the Hon. William P. James, who heard the case, was at a great disadvantage. However, without the advantage of seeing and hearing the witnesses, and without the advantage of hearing the mechanical exhibits orally analyzed and explained in their disclosures and relationships, and particularly, an oral comparison between the model of the invention in the patent sued on and the alleged infringing device; nevertheless, the Court has shown a very clear understanding of the alleged invention, and the alleged infringing device, in connection with the patents and the mechanisms of the prior art (included in the opinion), and the law pertaining to the matters involved herein.

The Patent in Suit—Summary.

The patent sued on [Exhibit No. 1], No. 2,096,119, issued October 19, 1937, on an application filed April 13, 1936, includes early in its specification, as its first object:

"the provision of certain new and novel features and advantages beyond the improvements in metal spraying devices as set out in United States Letters Patent granted to Rudolph Lensch and Paul Leder, January 8, 1935, No. 1,987,016."

Plaintiff's gun, made under the patent in suit, is Exhibit No. 5.

Defendants contend that said so-called "new and novel features and advantages," by plaintiffs, at most, were only mechanical skill improvements over their prior patent referred to [Exhibit "K"]; and furthermore, that these so-called improvements were all found to be old in the prior art discovered by defendants, and not cited by the Patent office against the application on which said patent in suit was issued.

Only two patents were cited by the Patent Office in rejecting all of the original claims except one. [File Wrapper, Exhibit A, R. 403.]

Defendants cited some eight prior patents, foreign and domestic, not found by the Patent Office, and which clearly show that all the structural features of the patent sued on, were old, very old, in the same art. These prior patents are dealt with more in detail later herein. They are also referred to in the opinion of the Trial Court. [R. 25-35.] As examples:

The idea of "controlling the wire feed through the gun whereby any desired pressure may be exerted on the wire," is taught in the Valentine patent, Exhibit G [R. 464], not

considered by the Patent Examiner; and by the Irons patent, Exhibit H [R. 472]; and by the French patent, Exhibit C [R. 442], not considered by the Patent Office.

The idea of providing "a hinged latch construction whereby the top feeding wheel is releasably confined," and whereby it "can be unlatched and lifted on its hinged connection out of the way," was old in plaintiffs' prior patent, Exhibit K [R. 488]; also in said old French patent, Exhibit C.

The idea of forming "the combustion unit of a gun as a separate and distinct entity from the mechanical unit or power plant of the gun" was also old in the French patent, Exhibit C [R. 442]; in the metallizing gun, Exhibit No. 6; and in the Valentine patent, Exhibit G [R. 464].

The idea of providing in a spray gun "a casting as an integral part which will contain the housings (plural) for encompassing **the gears** of the transmission **as well as the turbine** for driving the transmission gears and to so form the casting that it will have a channel way for the feed wire, free and clear of the interiors of the gear and turbine housings," was also old many years prior to the application. This is most clearly shown in the old French patent, Exhibit C [R. 442]; and in the French gun, Exhibit N; and in the different publications, such as "El Salvador" Defendants' Exhibit O, which seems to have been omitted from the Book of Exhibits.

In other words, all of the general objects set forth in the patent specification were already known in the prior art, and particularly in the French patent, the Valentine patent, the Irons patent and the British patent No. 268,431, Exhibit F.

The Alleged Infringing Device—A Summary.

The alleged infringing device is known as the "MOGUL" gun and is Exhibit No. 8. It had been designed, built and was on the market in February of 1936 [R. 78, 159]. No application for patent was ever filed therefor [R. 172]. The inventor did not consider it patentable, for in addition to making mechanical improvements on their prior gun, the "Metallizer," Exhibit No. 6 [R. 160-162], Mr. Boyden said he got some ideas for improvements thereof from certain foreign patents for Spray Guns, and from circulars thereof, received from a Mr. Gossner, their exporter [R. 162], who had his agents in Germany, France and Switzerland, and particularly from a certain old French patent No. 680,554, of December, 1928, Exhibit C, and from an old French gun, Exhibit N, **which was a trade-in on one of their "Metallizers."** Said French gun is shown in said French patent.

The "MOGUL" gun was really a refined copy of the French gun, and improvements made in their "Metallizer" gun, Exhibit No. 6, and did not involve invention for this reason.

In Re Appellants' Opening Brief:

In their "Brief History of the Metal Spraying Art," it is stated that "Contemporaneous with plaintiffs' invention, the art began to assume great commercial importance and continues to grow in popularity."

The art was well developed long before plaintiffs ever entered the field. The prior art clearly proves this.

When plaintiffs, on page 5, state that "The prior art is completely devoid of such features: 'the location of

knurled wheels which deliver the wire, in an open channel between the wall of the turbine housing and the adjacent wall of the transmission housing,' " they are pointing out the only different feature they have from the prior art and the **reason for the limitation in all of their claims**. Defendants contend that even this is nothing more than ordinary mechanical skill.

Plaintiffs' opening brief is given largely to trying to make out that old and well known elements, constructions and arrangements, were new and original with them, overlooking the many prior patents **not considered by the Patent Office** in considering and rejecting their application.

Plaintiffs' photostatic illustration of defendants' Mogul gun, between pages 24 and 25, in the lower illustration shows the hinged member carrying the upper feed wheel thrown back, in an attempt to try to make out that defendants' gun has an "open channel." This can be opened for inspection, but must be closed for operation and when closed, said feed wheels and wire cannot be seen, as can they in plaintiff's spray gun.

It is only necessary to read Mr. Boyden's testimony to see that here was an honest engineer and mechanic trying to make it clear that he did not consider that **any of these guns involved anything more than mechanical skill**, including his own, and that they all operated in substantially the same manner [R. 212]; and plaintiffs would seem to indicate that one manufacturer has not the right to study his competitors' products and even his patents and try to improve upon them. That is provided for in our patent laws—patents for improvements, if those improvements rise to the dignity of invention.

Some General Principles Involved Herein:

That much of what use to be considered invention is today considered to be the result of mechanical skill only, by reason of the high degree of development in the field of engineering knowledge and mechanical skill. Or, as it has been stated in another way:

“The education of today makes mechanical skill of what might have been inventive genius fifty years ago.” (Macomber: “The Fixed Law of Patents,” page 48.)

In the construction of patents and patent claims, it must be born in mind that the general public and industry have acquired rights in the fields of invention and mechanical knowledge which must be taken into consideration, for much engineering wisdom and mechanical skill are employed in industry.

Patents of a secondary nature, which this one surely is, must at most be strictly construed and each inventor is entitled only to the specific form of the alleged invention or improvement which he produces, **if it rises to the dignity of invention at all.**

Prior public use, sale, or **offer for sale** of an invention more than two years before applying for a patent therefor is fatal to any patent which may be issued therefor after that period. The statute is absolute and binding. As has been said: “A moment later and the inchoate right is lost beyond recall.” (Macomber: “The Fixed Law of Patents,” p. 63.)

Acquiescence in the rejection of original claims on prior patents, and the acceptance of amended and more restricted claims, binds the applicant to the imposed restrictions and limitations, and he is estopped from claiming a construction of his claims to give them a breadth equal to claims rejected.

In the language of Mr. Justice Brown:

“The object of the patent law in requiring the patentee to ‘particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery,’ is not only to secure to him all to which he is entitled, but to **apprise the public** of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.”

McClain v. Ortmyer, 141 U. S. 419; 35 L. Ed. 800.

The First Inventive Act in Metal Spraying.

Probably the first inventive act in the art of spraying molten metal on to a surface was disclosed in the Morf U. S. patent No. 1,128,175. Defendants' Exhibit J, issued February 9, 1915, in which the idea of reducing metal to molten or liquid form and spraying it onto a surface was disclosed to the public, and in this patent the idea of moving a rod of metal into intersection with burning gases, under pressure for this purpose, is diagrammatically shown and explained.

The old French patent, Exhibit C, before referred to, issued in January of 1930, shows a very important mechanical embodiment of the invention disclosed in this

Moré patent, including the box type of metal spring gun. Defendants' gun is the boxed box type.

The 2d French gun, Defendants' Exhibit N, which was taken in as a trade-in, furnishes an actual physical embodiment of the invention referred to.

Other prior patents are hereinafter referred to as showing the mechanical developments and embodiments of the invention first suggested by the Moré patent. Certainly much of the possible field for invention in this art was taken up by this French patent and these other prior patents, not considered by the Patent Office in issuing plaintiff's patent in suit.

The Application for the Patent in Suit

The Specification.

In the specification of the patent, page 2, lines 1 to 11, second column, we have reference to the special form of the casting in these words:

'Another object of this invention is to provide in a metal spring gun a casting in an integral part which will contain the housings for encompassing the gears of the transmission as well as the turbine for driving the transmission gears and to so form the casting that it will have a channel way for the wire from the rear end of the turbine to the gear and turbine housings.'

And on page 2 of the specification, second column, lines 7 and 8, it is emphasized that

'By an improved structure the operator has a full vision of the wire from the time of its en-

trance through the rear wire guide 47 and across the face of the knurled portion 34b of the lower wire feeding wheel into the front wire guide 48"

Original Claims Rejected:

From an examination of the File Wrapper, Exhibit A, in the Lensch and Leder patent [R. 407], it is revealed that original claim 6 is the only one allowed out of the six claims asked for, and this was considered allowable only because it included "a baffle" in the nozzle base with "a plurality of openings therethrough adapted to direct the flow of compressed air from said nozzle base." This is claim 1 in the patent. Defendants do not use any such baffle. We point out, however, that French patent 741,740, Defendants' Exhibit B [R. 429], Fig. 4, clearly, and according to Mr. Stueres' testimony [R. 352], shows baffle plates in the nozzle to be old. This patent was not before the Patent Examiner in considering the application. Had it been, we doubt if said claim 6 would have been allowed.

The only patents considered by the Patent Office, according to the File Wrapper, were U. S. patent to Irons, No. 1,917,523, Exhibit H, and British patent No. 208,431, Defendants' Exhibit F.

Defendants' Exhibits B, C, D, E, G, H, J, K and L, are all prior art found by defendants and not found or considered by the Examiner.

In the first Patent Office action, the Examiner rejects claims 1 and 4 on the Irons patent, Exhibit H, "as obviously fully met."

The Examiner says:

“Claims 2 and 3 are each rejected as not presenting invention over the British patent, Exhibit F. In the British patent the wire feed wheels are located in a housing separate from the gear housing. The walls of the feed wheel housing of the British patent form a channel equivalent to that of applicants.”

“Claim 5 is rejected as drawn to an old combination. Irons shows the combination of a spray gun and a turbine. The specific form of the turbine and impeller does not have any cooperative effect on the combination. Applicant should claim the turbine structure *per se*. Claim 6 is allowable, as at present advised.”

New Limited Claims Presented:

By amendment filed, the attorney cancelled claims 1, 2, 3, 4 and 5, **thereby acquiescing in the rejection of said original claims** on the two prior patents cited; and three new claims were submitted, being present claims 2, 3 and 4 of the patent, and constituting the claims relied on in the charge of infringement against defendants. They all include the limitation inserted in order to secure allowance, which limitation **defendants' device does not have**, namely, an “open channel” construction which is shown to be of special form, made possible by a skeleton-like body casting.

“If a patentee acquiesces in the rejection of his claim on references cited by the Patent Office, and accepts a patent on an amended claim, he is thereby estopped from maintaining that the amended claim

covers the combination shown in the references, and from claiming that it has the breadth of the claim that was rejected.”

National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. Rep. 693-714; 45 C. C. A. 544.

By examination of said original claims, we find that the clause involved, before amendment, reads as follows:

Claim 2. “. . . said member having a passageway exteriorly of the gear housings thereof and the walls of said passageway providing a **channel**,” and later “said channel” is referred to.

Claim 3, designates it as “a **channel way** in said member free and clear of the interior of its gear chambers,”

In other words, in all of the claims rejected, the space between the turbine and the gear housings on this casting is referred to as a passageway providing a **channel** for the wire feeding wheels. The casting with the turbine housing on one side, and the gear housing on the other side, is a skeleton-like form, leaving this necessary passageway or channel **all open** so that it **can be seen from above** and from **the sides** and the **rear**, for inspection of the wire and the wire feeding wheels **during operation**.

In all machines, including the box type, such as the old French patent referred to, and the “Mogul” machine, there must necessarily be a passageway or channel for wire feeding wheels, but they are inside the box structure, and the feed wheels therein cannot be seen **without opening** the lid or top of the box when the machine is not in operation.

The New Claims and Their Limitations:

We now turn to the three claims which were prepared and substituted for the cancelled five claims.

Counsel most respectfully urges that the circumstances under which the new claims were prepared, the specific amendments included therein, and the argument used by the attorney who prosecuted the application, in order to persuade the Examiner to allow these claims, **are absolutely controlling**. Instead of mentioning simply "a channel" or "a channel way," the term "open channel" was substituted for "channel," and the meaning of, and the reason for, the "open channel," were explained and urged as for "visibility" of the **feeding action while operating.**"

There would be no particular reason for providing an "open channel" for a machine **not in use**, for in all of the machines, old and new, the cover can be opened for inspection purposes, but **inspection is one thing, observation in action, or during operation, is another.**

Now the limiting structural features in the three claims sued on are as follows:

Claim 2 contains the following:

"said member including housings for said turbine and gears and **an open channel** in its walls exteriorly of said housings, said wheels being adapted for rotation in said channel, . . . and means including **an abutment** between the **nozzle base** and the walls of said member for releasably confining said units in operative association **whereby said wire feeding wheels are visibly** disposed in said channel."

The abutment referred to is at one side only and the nozzle base is attached thereto by three screws 63, which construction makes it possible to cut away the opposite side and leave the space open for the pipes, as seen in Figs. 1, 2 and 3 of the drawings.

Claim 3 contains the following limitation:

“and having **an open channel** in its walls **between** said housings, one of said wire feeding wheels being mounted on a shaft extending from the transmission gears beyond the housing thereof and adapted to rotate in **said channel**, the other of said wire feeding wheels being pivotally mounted on said member and adapted for rotation in **said channel . . .**”

Claim 4 contains the following definite limitation:

“**means for effecting the visible feed of wire through** said wheels **comprising: an open channel** in the walls of said member **between** the turbine and gear housings thereof, . . .” etc.

By inspecting plaintiffs' gun [Exhibit 5], made under the patent in suit, it will be more clearly seen just what is meant by the expression “open channel,” and the statement: “whereby said wire feeding wheels are **visibly** disposed in said channel.” Or, “means for effecting the **visible** feed of wire through said wheels comprising: an open channel . . .” etc. As viewed from the rear, the top, or the sides, it will be seen that the structure is of open, skeleton-like form, and that the pipes to the nozzle, up through the handle, are also

positioned in this open area or channel and have plenty of room. Fig. 1.

The argument used by the attorney to persuade the Examiner to allow the amended claims is so important, we quote it as follows [R. 409-410]:

“Relative to Irons, No. 1,917,523: It is desired to note that **Irons does not provide for the visible feed of the wire through the gun.** He does not contemplate a wire feeding mechanism other than the ‘conventional’ construction which includes the wire feeding mechanism and feed wheels in the same housing **without the ability to see the wire except by shutting off the tool and opening the cover of the mechanism housing,** such, for example, as the Schoop type of wire feeding mechanism as contained in a square box housing. While Irons does provide separate power and combustion units, joining them together for operation, his structure does not teach applicant that with the conventional square box gear and feed wheel housing **a channel can be formed exteriorly of the walls of the mechanism housing by the abutment of the nozzle base and the gear housing for the reception of the wire feeding wheels and so that the feed wheels will be open to view and the wire passing therethrough can be observed in its feeding.** This utility in a metal spray gun is of great importance to a gun operator, particularly when inequalities in the metal sprayed deposits, due to irregularity of wire feed, require wire adjustments to be made **while the gun is operating.** Furthermore, the balling up of the wire, particularly with the softer metals such as lead, tin and zinc, requires expensive shut-downs and results in low output of the tool.”

Then referring to the British patent cited, the attorney says:

“Relative to British 268,431: What is said of Irons relative to **visible wire feeding** is equally true of the British structure, even though the wire feeding wheels are situated in a separate housing from the turbine and gear mechanism, because it is still necessary in this device to lift the cover of the wire feed wheel housing on the hinge 13 in order to see what is going on with the wire feed; in fact, the structure does not provide visible wire feed, even though it is one step advanced from Irons or Schoop in preventing contamination of the gears and bearings of the feeding mechanism from the particles or fines of the wire.”

The attorney then calls the Examiner's attention to an earlier Lensch and Leder patent No. 1,987,016 [Exhibit K] not cited, and says:

“It is desired to make this patent of record in this issue, as it has a direct bearing upon the removal of the wire feeding wheels of a metal spray gun from the gear box and mechanism contained therein, **whereby visible feed of the wire is occasioned** and the destruction of the gears and parts of the feeding mechanism from particles of the wire cut off by the knurled feed wheels is done away with . . .”

Then he says:

“The new claims herewith presented are thought to fully differentiate applicants' structure over the reference cited as well as over **their original structure**, and favorable consideration and allowance of same is courteously asked.”

We call attention to the structural feature which makes possible the very thing which the attorney referred to when he says in his argument:

“While **Irons** does provide separate power and combustion units, joining them together for operation, his structure does not teach applicant that with the conventional square box gear and feed wheel housing a channel can be formed exteriorly of the walls of the mechanism housing by the abutment of the nozzle base and the gear housing for the reception of the wire feeding wheels and so that the feed wheels will be open to view and the wire passing therethrough can be observed in its feeding.”

It is that structural arrangement in plaintiffs' gun wherein the nozzle base is secured at one side only of the body casting with the three screws 63, to the abutment on one side, leaving the other side open, as hereinbefore referred to, and so clearly shown in Figs. 1, 2 and 3 of the patent drawings. Of course Irons does not teach this, nor does any other patent, for it is the only structural difference plaintiffs have over the French patent and the French gun.

“The case is one where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee. He was not a pioneer. He merely devised a new form to accomplish these results.”

Duff v. Sterling, 107 U. S. 636; 27 L. Ed. 517;

Newton v. Furst, 119 U. S. 373; 30 L. Ed. 442;
7 S. Ct. 369.

Counsel Would Bring in New Functions for "Open Channel."

Plaintiffs' counsel would now urge that the "open channel" is for the purpose of ventilation and that "it communicates with the atmosphere," and also that it is for the purpose of permitting any "dross" and "particles" to drop out. In other words, counsel for plaintiffs would bring into the picture these features in an effort to urge some other reason for the "open channel" limitation than that urged and argued by the attorney to persuade the Examiner to allow the claims.

It is only necessary to pick up defendants' gun to see that it is of the closed box type in comparison with plaintiffs' open, cut-away form of body, and only when defendants' upper feed wheel is tilted back can the wire and the lower feed wheel be seen, and this must be done when the gun is not in operation. All of the old closed box types afforded this means of inspection. That is: By raising up the lid and tilting it back on its hinge, the wire and the lower feed wheel can be seen. The old French patent discloses all of these features, and is the same as defendants' gun in all of the parts, separate housings, etc., with the upper feed wheel pivotally or hingedly connected to the body. The only difference in the French patent and defendants' gun is the fact that defendants, instead of using a cover, use a pivoted member which fits over the channel portion only of the body, but which substantially closes it against any observation while in operation. In said French patent, inasmuch as the turbine has a different housing, and the transmission gears have a separate housing, everything is enclosed except the space between the two housings and there is no need for a cover over the

whole area of the box. Defendants' upper wheel, when in operative position, does not permit inspection or observation of the operation of the feeding action. In other words, there is no "means for **effecting the visible feed of wire through said wheels comprising:** an open channel in the walls of said member **between** the turbine and gear housings thereof," as called for in the claims.

With the argument of the attorney for applicants in mind, it is only necessary to compare the open, cut-away body of plaintiffs' gun with the heavy, compact and closed form of body of defendants' gun, to realize that one is designed to give "visibility" of the feed action, while operating, while the other has no such provision or possibility.

Mr. Boyden testified repeatedly that there was no advantage in such a construction [R. 122-3], and Mr. Undell, plaintiffs' own witness, testified of the Mogul gun that:

"It is more sure, and you know, when you are going to light the gun, you are more sure that it is going to light and operate correctly." [R. 136-7.]

A very important feature is to be noted about plaintiffs' gun and that is: When the upper feed wheel of plaintiffs' gun is tilted back, **the visibility is not changed**, for the wire and feed wheels are just as visible from the top, the rear and the right hand side. It is all open so that the feed wheels are exposed from the rear, from the top and from the side, and yet the construction gives bearings for both ends of the shafts without using the old closed box type of body.

Mr. Boyden in his testimony on cross-examination [R. 118] stated, referring to Plaintiffs' Exhibit 5:

"It is open all the way back here, a complete view of everything. It is open all the way around here, with a complete view in the front here, and the body of the gun here, or rather, the open channel, so-called, is open on the top and the bottom and the rear and the side, completely open."

Mr. Boyden also testified, referring to the Mogul gun, on cross-examination that:

"You cannot see the wire as it enters between the feed wheels or as it emerges from the wheels as you would hold the machine in operation."

When holding the Mogul gun in the hand, only the outer end of the rear wire guide can be seen as it projects out of the body; that from the left hand side it is only possible to see the side of the upper feed wheel, and when the upper feed wheel is tilted back in **inoperative** position, it is only possible to look down upon the top of the lower feed wheel, down in the small chamber formed in the body. Said chamber is just large enough to receive the lower feed wheel and its gear. Its lower end is closed by the handle secured thereto, with the exception of a small hole and this is not visible when the handle is secured in place.

Referring to the enlarged photostats of defendants' gun, Plaintiffs' Exhibit **No. 9**, this might be misleading for it shows defendants' gun enlarged to four or more times the size of the actual gun, with the **upper feed wheel and hinged member thrown back in inoperative position**, and also with the handle detached. Counsel

undertook to use this as an argument that defendants' gun had an open channel, that is: open to daylight and ventilation and for the possible dropping out of the gun any "fines," purposes not even mentioned or suggested in the specification of the application.

Every effort has been resorted to to avoid the specific structure put into plaintiffs' claims **by amendment in order to get them** allowed, even over the only two references found by the Examiner, and over their attorney's argument in connection with the prosecution of the application as to the importance of "visibility" in observing the operation, and even Mr. Leder testified it was "an advantage to any gun to be able to see the wire going through there."

Testimony of Expert Witness, Mr. Stokes.

When we come to the testimony of Mr. Charles L. Stokes, who was brought in as an expert to testify on behalf of plaintiffs, we are strongly reminded of the decision in *Ideal v. Crown*, 131 Fed. 244; 65 C. C. A. 436, wherein the court said:

"Unhappily we cannot accept without reservation the opinions of the experts who have been examined as witnesses, for they are necessarily partisans of the side calling them, and essentially advocates, and their opinions are contradictory, and tend to perplex, instead of elucidating, although they appear to be gentlemen of great ability and deserved eminence."

Mr. Stokes' testimony on direct examination adds nothing to what is perfectly clear from the patents examined and the specifications and drawings thereof to anyone un-

derstanding anything about mechanics at all, except to disclose how the witness always emphasized certain features **outside of the patent** which plaintiffs are urging in a strained effort to establish infringement, and most of which were brought into the case by plaintiffs' counsel in his opening statement.

We would therefore, call attention to the fact that there is absolutely no mention whatsoever of any "backfire" or of "explosion," or anything of the kind, in the specification or claims of the patent. There is no reference to any structure or features of the invention to take care of possible backfire or explosion.

Counsel also undertook to create the impression that plaintiffs were the first to provide what he called "two essential elements" namely: "a power unit or a wire feeding mechanism"; and the other he designated as "a combustion unit." These features have been shown to be old in the French patent, 680,554 [Exhibit C] and they all have them separated, as in the Lensch and Leder **first** patent; the **metallizer gun**, and the **British patents**.

The only purpose for the skeleton-like construction of plaintiffs' gun is to make possible the "open channel" to give "visibility" **during operation for observation purposes** [R. 410].

The only reason for referring to these features here is to show how Mr. Stokes becomes an "advocate" of these features brought into the picture by counsel in his opening statement.

For example, Mr. Stokes says [R. 342-3]:

“The open channel in the plaintiffs’ gun and in the defendants’ gun permits the passage of any ‘fines’ and that eliminates any wear from ‘fines’ on the wire feeding wheels.”

This is of no consequence and is not even mentioned in the specification, and it is not at all true of defendants’ gun, while it is true of plaintiffs’ gun.

It is only necessary to examine the testimony of “Expert” Stokes on cross-examination, as found on pages 328-355 to see how he was reluctant in many cases to give straight forward testimony as to matters which could be answered yes or no and as to facts which were self evident as physical structures. This is particularly true of his testimony relative to the French patent and the physical embodiment thereof, Exhibits C and N, as found at pages 344 to 355. And on the matter of the channel in the French patent he says: “It is a space. Let us put it that way.” [R. 353.]

It is clearly evident from the evidence that the prior art discloses every structural feature which is set forth in the claims of the patent sued on; that what was done, even over the two patents cited by the office, was only ordinary mechanical skill; that when we take into consideration the other patents referred to, and especially the French patent [Exhibit C]; and the French gun [Exhibit N] and the Spanish circular [Exhibit O] “El Salvador” and the illustrations thereon, that the cover of this French patent, clearly shows an oval opening of considerable size for the spring latch, and that the chamber, or channel, or space, in this French gun body would have to be considered as

much an "open channel" as that shown in the Mogul gun. But "open channel" in the patent sued on is a different thing. Plaintiffs' gun is designed with an open and cut-away frame or body casting to provide the visibility, and even uses only one side of the body for attaching the nozzle base. This is the difference between the plaintiffs' gun and the Mogul gun. The "open channel" is formed between the housings in the body and the walls thereof, and in that true and actual sense, plaintiffs' gun is the only gun in all the prior art so constructed and arranged.

To construe the term "open channel" as readable on the Mogul gun, is to give it a construction which would render the claims invalid on the French gun, for its chamber is open for ventilation purposes in the unusually large latch opening.

Defense of Prior Public Use and Offer for Sale.

One of the defenses urged by defendants was that the invention of the patent in suit was made and offered for sale more than two years before the filing of the application for the patent. This defense was urged under a full general denial in paragraph IV of the Answer. [R. 11, 12.]

Plaintiffs contended that it was a special defense and that further particulars were required. The Trial Court permitted an amendment to the Answer. [R. 17a. 150.]

Defendants urged that "Under the New Rules" it was sufficient to deny the allegations of the complaint that the improvements were "not in public use or on sale in this country more than two years prior to said application." but took advantage of the Court's offer to "allow an

amendment to specifically plead” the defense to be offered, as was done. [R. 150.] The amendment was as follows:

“XVII. For a fourth, further and separate answer and defense, said defendants allege that the invention of the patent sued on herein was known and used and circularized and offered for sale for more than two years prior to the filing date of the application on which said patent was issued, which filing date was April 13th, 1936; namely, as early as April 5th, 1934, and prior thereto, when the Metal Spray Company, by its manager, H. B. Rice, issued a circular letter ‘TO ALL DISTRIBUTORS AND AGENTS,’ calling attention to the ‘NEW TYPE GUN’ and to the special Bulletin 500; that one of said letters was signed by and sent by said H. B. Rice, as manager of said company, to and was received by Wm. M. Britton, a dealer; and that said original letter and one of said bulletins 500 are ready and will be offered in evidence to prove such public use and sale.”

The special letter “To All Distributors and Agents,” Defendants’ Exhibit M, appears at pages 257-265, and the Bulletin 500, is reproduced at pages 266-269 of the record. The testimony of Harry B. Rice, the man who wrote the letter and signed it, and added at the bottom a handwritten note to Mr. Britton [R. 265], identifies the letter and the date “April 5th, 1934”; and the testimony of Mr. William M. Britton identifies the letter as the one he received, and the handwritten note thereon is the “distinguishing mark.” [R. 300.]

The testimony of Mr. Rice [R. 271-3] definitely establishes that he as salesman, took the new gun to San Francisco and displayed it to one George Stoddard on the Friday preceding February 19, 1934.

The testimony following [R. 274-275] discloses the fact that the machine was actually used in March, 1934. Mr. Rice further testifies that "During discussion in the summer and fall of 1935, I expressed myself as of the opinion that the application could safely be filed in December of 1935 or January of 1936. I was very much in doubt concerning the matter after that time."

It was certainly "on sale" when the letter was sent, accompanied with a bulletin showing the gun with full and detailed explanations, and was displayed to Mr. Stoddard "in order to aid in convincing him that he should cancel his distributing agency at that time so I could give the distribution to other parties." [R. 272.]

Mr. Britton testified, relative to the circular, "I received a number of circulars of this type from Mr. Rice" [R. 300-302]; that "it was customary for him to receive letters from Mr. Rice"; "It (such a letter) was received in the spring of 1934, as I remember." In answer to the question: "Did you ever receive and sell any of the guns referred to?" Mr. Britton answers: "I received one of the guns; yes, sir." "That was in the spring of 1934." [R. 302.] "It was turned over to the agency in Detroit who succeeded me." "And that was in the spring of 1934."

This issue was decided against defendants, wrongfully we thought, and therefore it is brought to this Court without cross-appeal under the decision in **Oliver-Sherwood Co. et al. v. Patterson-Ballagh Corporation et al.**, 95 Fed. (2d) 70, this circuit, which held:

"Where patents are held valid but not infringed and plaintiffs appeal and attack the finding of

noninfringement, defendant, **without a cross-appeal**, may attack that portion of the findings and decree which holds the patent valid.”

See also:

Herman Body Co. v. St. Louis Body Co., 8th Circuit, 46 Fed. (2d) 879.

Summary of Evidence Supporting Prior Public Use and Sale:

Referring further to the testimony of Mr. Rice, he definitely testified as follows:

That he was familiar with mechanisms of the character involved in this suit and that he held managerial positions for companies; that he was associated with the Metallizing Company of Los Angeles as early as 1930 or 1931, a shop which did job spraying [R. 222]; and was superintendent of the shop; that he had frequently operated spray guns; that after leaving the Metallizing Company in the spring of 1931, he became associated with Mr. Lensch and Mr. Leder [R. 226-7] in an exceptional arrangement; The Metal Spray Company was registered in the county with himself as the sole owner; Mr. Lensch had the shop and shop equipment; and Mr. Leder was working and supplied the labor in connection with metallizing and spraying; Mr. Rice did the field work, developed applications, obtained jobs and business, etc., at that time they were using a gun of a box type, similar to **all box types of guns**, such as the **Schoop** and the early **Metal-lizing gun**; that the gun which we were using at that time was a gun on which Lensch and Leder had a patent, No. 1,776,332, issued September 23, 1930 [R.

231] Defendants' Exhibit L; that the gun covered by Lensch and Leder patent No. 1,987,016, of January, 1935, Defendants' Exhibit K, was developed in August or September, 1931, or within six months of the time Rice entered into the arrangement with Lensch and Leder [R. 229], and the first guns were sold shortly before Thanksgiving of 1931; that one objection to this gun, Exhibit K, after it had been in the field for six months or a year, was the fact "that the outside wire feeding wheels were supported only on one side of the case." [R. 233.] He says: "I thought it would be an excellent idea to incorporate a bearing on the outside, or rather on both sides of the wire feeding wheels." And the second objection was the fact that in the Model 125 gun [Exhibit K] the tension spring used to exert pressure on the upper wire feeding wheel, in order to hold the wire in feeding position, was a fixed spring tension and not subject to manual variation. [R. 233-4.]

Mr. Rice further testified [R. 234] that Lensch and Leder made the changes and brought out the Model 126, which is the plaintiffs' gun, Exhibit 5, "incorporating an outside bearing on the feeding wheels, keeping the rear of the nozzle separate from the gear chamber and, in addition, effecting a much better balanced gun." He says that this gun was developed in December of 1933, or January of 1934. [R. 235.] **"By this I mean the first model of the gun."** [Exhibit 5.]

He refers to the "customary practice" of testing in the shop, to get the necessary information "for me to write **a manual of instructions which had to accompany the gun.**" [R. 235.] He stated that these tests went on for

probably 30 days; that the next stage was the photographing of a finished model in order to produce cuts or electrotypes in order to print the circular and to disassemble the gun completely and lay out the parts in such manner that they could be numbered and photographed in order to use in connection with the manual of instructions. [R. 236.]

Mr. Rice further testified that "the gun that was photographed or the gun that was produced ready for photographs must have been in my hands, I would say, the early part of **March** or the middle or last of February," 1934. [R. 236.]

Mr. Rice identified a carbon copy of a letter addressed: "Los Angeles, California, April 5, 1934; Subject, New Type Gun; to all distributors and agents." [R. 237] as a letter written and signed by him and sent to a Mr. Britton, with a personal note at the foot thereof, written in Mr. Rice's own hand to Mr. Britton. This letter is Defendants' Exhibit M. [R. 239.]

This letter referred to a Bulletin 500 which accompanied it and this Bulletin showed a cut of the completed gun thus ready and offered for sale at that time. [R. 240-241.]

Mr. Rice also testified relative to one of their dealers in San Francisco in 1934, DeLaval Pacific Company, with whom he corresponded, and identified a letter of March 17, 1934, which he wrote. [R. 254-255.] Letter and Bulletin, Exhibit M. [R. 257-269.]

He testified that the spray gun, made under the patent in suit, was completed and ready for demonstration "In December, 1933, or January, 1934;" [R. 271.] That he took it to San Francisco and displayed it to their agent—The DeLaval Pacific Company; to Mr. George Stoddard on Friday **preceding February 19, 1934.** [R. 271-273.]

Mr. Rice further testified [R. 272] that "The gun was displayed to Mr. Stoddard in order to aid in convincing him that he should cancel his distributing agency at that time so I could give the distribution to other parties, showing—or I should particularize. The question of the cancellation involved my taking back four old style guns at their cost. And the purpose of displaying the gun was to convince the distributor that they might not be able to sell the four old-style guns prior to a general announcement of the new gun." The agency was established at that time, and "that was in February, 1934." [R. 273.]

About the gun, he testified "I know it had not been patented." "I was informed by Lensch and Leder that their patent attorney at that time had not considered the features of sufficient uniqueness to obtain a patent; that only mechanical skill and ingenuity was involved;" the matter was discussed between Mr. Rice and Mr. Martin. [R. 273.] Mr. Rice says: "I expressed myself as of the opinion that the application could safely be filed in December of 1935, or January of 1936. I was very much in doubt concerning the matter after that time." [R. 275.] This testimony was not contradicted by Mr. Martin.

Mr. Rice testified that the gun was used in the shop as follows: "It was used in the custom shop for tests, for job work on a number of occasions in March, 1934." [R. 275.] It was used after that "on regular job work" and gave satisfaction.

On cross-examination, Mr. Rice confirmed his testimony that the Bulletin 500 was copyrighted in his own name and explained why. [R. 278.] He had previously testified [R. 242-3] that "In 1935, September 17th, to be exact the Metal Spray Company, unincorporated, the previous company, was taken over by the Metal Spray Company, Inc., a corporation, formed by Mr. Martin and myself. This purports to be, this circular which **I produced** here from my portfolio, is a reprint, a copy of the original circular, with the name Metal Spray Company, Inc., attached thereto." "That is the only difference."

This testimony explains the slight difference in the two Bulletins 500 presented. The one sent with and referred to in the letter of April 5, 1934, was of the first batch and did not have the company name printed on it.

On this bulletin, sent with the letter of April 5, 1934, was a photograph or cut of the spray gun which had been completed, tested, used in the shop and was being offered in this way for sale as early as April 5, 1934, and was exhibited to Mr. Stoddard in San Francisco as early as February 19, 1934 by Mr. Rice himself. [R. 251.]

Mr. Britton Confirms.

Mr. William M. Britton in his testimony, said he had been in the metal spray business since 1933; that prior to that he was in engineering work; that he was a major in the United States army in the last war; that he had an agency for a metal spray gun in Detroit, in 1933 [R. 298]; that he was the Metal Spray Company of Los Angeles; that Mr. H. B. Rice was the sales manager at that time and that he had correspondence with Mr. Rice.

Mr. Britton also testified, after some refreshing his mind and examining the letter (Exhibit M), that he received the letter from Mr. Rice. He says, after examining the letter: "Yes. It says—or that is a distinguishing mark." [R. 300.] It says, "Mr. Britton: Under another cover, by airmail, am sending essential pages of the manual. The complete manual is going forward by regular mail. **'That does identify it as the circular letter which I received.'**" He also testified that he received the circular Bulletin 500, or "I received a similar circular from the Metal Spray Company." "I gave him (Mr. Boyden) a circular along with the letter, yes, sir." [R. 300.] So that Mr. Britton's testimony established the receipt of the letter of April 5, 1934, Exhibit M, and one of the Bulletins 500, and confirms the testimony of Mr. Rice about the letter and the Bulletin 500, with cut of the gun thereon.

Mr. Hicks Printer of Manual.

Mr. Hicks testified [R. 308] that he is in the "Printing and letter service"; has been in that business about seventeen years; that in April, 1934, he did printing for the Metal Spray Company; that he "mimeographed some manuals, manual of instructions"; he presented one of the manuals and described it, and that down in the lower left-hand corner it says: "Copyright 1934, H. B. Rice." That the particular copy came from his own files; that it was completed and delivered on April 7th, 1934; that the bill or price was \$29.25; that he received a check for the amount and identified the check, and said: "Yes, it is, and I recognize it also from the fact that the name, 'The Hicks Company', is written in my own writing. I wrote that myself." [R. 309.]

The manual was introduced in evidence and marked "Defendants' Exhibit P [R. 310], and it was stated that this manual was the manual of instructions set out to dealers and was the manual referred to at the bottom of the letter of **April 5, 1934**, written by Rice to Britton, and contained full instructions about the new style gun. Mr. Hicks also referred to duplicate invoice from his files and further identified and confirmed his testimony about the printing of the manual as testified to. The check given to Mr. Hicks was also introduced and marked "Defendants' Exhibit Q." [R. 312.]

Mr. Brown Called by Plaintiff.

Mr. Brown, of the New Method Printing Company, called as a witness by plaintiffs [R. 313], was uncertain in his testimony only as to the first run of Bulletin 500 which he printed; the record which he had was simply a cash entry sheet showing cash received with no identification [R. 314-5], but showing that he received a payment by check dated June 28, 1934 in the amount of \$30.00; Mr. Brown says, on cross-examination: "I am under the impression that the first time we did business with him that he paid cash for the order right promptly afterwards. The longer we did business the slower the payments came." [R. 318.]

Mr. Leder Recalled.

Referring to the matter of the completion of the gun in question, Mr. Leder testified [R. 319]: that their gun was completed as early as February, 1934; that they started somewhere about October of 1933. [R. 319.] This corresponds with the testimony of Mr. Rice who testified [R. 235]: "This gun was developed, based upon my memory, which has been checked recently by some correspondence I have, and as I would estimate, in December of 1933, or January of 1934." "By that I mean the first model of the gun." He also testified "that these tests went on for probably 30 days."

Mr. Leder further testified that he had no knowledge of this gun being taken out of the shop by Mr. Rice and shown to anyone in San Francisco in February of

1934, on cross-examination, but he admitted that Mr. Rice was salesman, and talked himself into being sales manager [R. 323]; that his business was to sell guns; that "After we had the gun going and so on, and as he was the salesman, he could more or less indicate what the trade wanted, in an endeavor to make it applicable to certain features which were to our advantage for sales." "And it was his business to explain this gun to prospective customers and to explain its merits." "Mr. Rice would naturally, have to have the gun in order to exhibit it to different customers, prospective customers." [R. 325.] "After it was ready and finished and so on, we consented to let him take it out to customers or prospective customers for demonstration" and "permitted him to take it out and have it photographed in order to prepare the circulars for advertising." "And these circulars were made from this particular gun, the first gun that was made." [R. 325.] Mr. Leder avoids saying whether they had any other guns in the process of manufacture about the same time. He also testified as to the advantages of making their gun cut away in front so as to expose the feed wheels and the passing of the wire into the nozzle, and also in the rear, and when asked if there was any advantage to be able to use your gun and to see the wire passing through there, he answered: "Well, it would be an advantage to any gun to be able to see the wire going through there." [R. 327.] To see the action or operation, of course, is the only purpose of so constructing the body as to provide openness, referred to

as an open channel. He does not say anything about inspection when not in operation. When asked the question: **“And is it an advantage to have that structure a skeleton, showing it left open?”** he answered [R. 327]:

“Not only that. It is also an advantage in reducing the weight of the tool, because the heavier the gun will be in the hand of an operator the quicker the operator will get tired and have to rest, but taking out every little bit of weight in the gun, it enables the operator to keep on operating a longer period of time.” “So that in addition to giving visibility from front and rear of the feed wheels you have a lighter machine.” [R. 327.]

In this connection we would again call attention to the special construction of the plaintiffs' gun to be seen in Figs. 1, 2 and 3 of the patent drawings, which shows how the nozzle base 49 is secured in place by one side only by three screws 63, leaving the other side wholly open and free and clear of the gear and turbine housings. There is no such construction and arrangement found in the prior art and if there is any invention in the gun at all, over the spray gun art, it must be limited and confined to this specific arrangement for forming the “open channel” for visibility of the mechanism mounted therein, namely: the feed wheels, the wire guides and the wire as it is moving therethrough.

Defendants do not have such a construction, but on the contrary, have a heavy, mogul, type of body, more like a closed box with everything housed therein and with no visibility whatsoever of the operating parts while the gun is in operation. To try to see into it while it is operating would certainly be ridiculous.

“The Metallizer”, Defendants’ Magazine . . .

Plaintiffs have seen fit to introduce into the record, in order to show defendants’ activity in advertising and pushing their guns, the Official Organ of the International Metallizing Association, of certain dates, as follows, to-wit:

“Midwinter Number December, 1935-January, 1936.”
Ex. 10-a [R. 75];

“February-March, 1936.” issue. Ex. 10-b [R. 78];

“April-May Issue, 1938.” Ex. 10-c [R. 82];

“June-July Issue, 1938.” Ex. 10-d [R. 86];

These publications clearly establish the fact that the “MOGUL” gun was already on the market prior to the “February-March, 1936” issue of “The Metallizer,” and this was long prior to the date of the patent sued on, namely, October 19, 1937.

Witness Boyden, the designer thereof, testified [R. 159] that the “MOGUL” gun was brought out in 1936.

From the “Midwinter Number December, 1935-January, 1936” issue, above referred to, we have the following:

“The Metallizing Company of America will soon have available in addition to their ‘Metallizer’ gun a new metal spray unit known as the ‘MOGUL’. This piece of equipment has been designed and built with but one thought in mind: *i. e.*, to offer to the public the finest piece of metal spraying equipment it is possible to produce to-day.” [R. 75-76.]

“Possessing the same general characteristics as the well-known ‘Metallizer’, certain features have been incorporated which make the ‘MOGUL’ particularly adaptable to certain classes of severe service and there is little doubt that it will find a welcome in this respect.”

But, quoting from the issue of “**February-March, 1936**” Exhibit 10-b [R. 78-79], we have:

“Photo shows ‘MOGUL’ Unit mounted on Lathe, spraying Stainless Steel on pump rod. Actual time check showed 10.2 lbs. sprayed in one hour. Smooth coating obtained.” * * * (Photo omitted.)

Then follows:

“Since the event of the Mogul Metallizing Gun, the public has shown such inquisitive interest that the writer decided to go over and pay a visit to the inventor of the tool which is causing such active comment. Mr. Charles Boyden of the Metallizing Co. of America Inc. is the gentleman responsible for this tremendous advancement in the metal spraying field.” [R. 78-79.]

The Law—Mechanical Skill v. Invention.

“A device which displays only the expected skill of the maker’s calling, and involves only the exercise of ordinary faculties of reasoning upon materials supplied by special knowledge, and facility of manipulation resulting from habitual, intelligent practice, is in no sense a creative work of the inventive faculty, such as the Constitution and patent laws aim

to encourage and reward.” *Williams Mfg. Co. v. Franklin*, 41 Fed. Rep. 393, 395.

Hollister v. Mfg. Co., 113 U. S. 59, 28 L. Ed. 301;

Thompson v. Boisselier, 114 U. S. 1; 29 L. Ed. 76;

Atlantic Works v. Brady, 107 U. S. 200; 27 L. Ed. 438.

“Long practice and observation naturally lead those familiar with the arts to the perception of new adaptations. Mechanical education and skill, fostered and promoted by the public, are rapidly advancing in every direction, and there is a constant and universal endeavor in handicraft to utilize that which is known, and press it into service in the practical arts. But the steps of this normal progress and improvement are not invention, nor the subject of monopoly to one who, in the exercise of the ‘skill of his calling,’ has put an old thing to a new use.”

Capital Sheet-Metal Co. v. Kinnear & Gager Co., 87 Fed. 333, 336; 31 C. C. A. 3.

In contrasting invention and mechanical skill Judge Nixon, in *New York Belting & Packing Co. v. Magowan*, 27 Fed. Rep. 362, 364, said:

“Invention indicates genius and the production of a new idea. Mechanical skill is applied to an old idea and suggests how it may be modified and made more practical.”

In the case before us, the invention was performed by Morf and by patentee in the French patent, and by Irons and by Valentine, if there was any room for invention following the French disclosure.

Defendants' contention is that after all of the mechanical features disclosed in the French patent, following the generic invention by Morf, had been made known to the world, only ordinary mechanical skill was required to produce any of the patents thereafter, and then, after all of the disclosures made in the art presented by Defendants' Exhibits B, D, E, G, H, I, J and K, to attribute invention to plaintiffs' mechanical refinements in their metal spray gun is to deprive the public and industry of mechanical and engineering and inventive knowledge which has already been dedicated to them.

Plaintiffs have done nothing more than **to carry forward old ideas** in an effort to make a more efficient metal spray gun and in doing this they have used only mechanical skill, just as Defendant Boyden did when he undertook to improve their Metallizer gun after gathering some new ideas from the French patent and other foreign patents.

Smith v. Nichols, 88 U. S. 112;

Penna. v. Locomotive, 110 U. S. 490;

Stephenson v. Brooklyn, 114 U. S. 149; 29 L. Ed. 58;

Consolidated v. Walker, 138 U. S. 124; 34 L. Ed. 920.

Merely to change the form of a machine is the work of a constructor, not an inventor. Such a change cannot be deemed an invention.

Winans v. Dermead, 15 How. 330; 14 L. Ed. 717.

Any change in form, though better, is not invention.

Belding v. Challenge, 152 U. S. 100; 38 L. Ed. 370;

Atlantic v. Brady, 107 U. S. 192;

Hollister v. Benedict, 113 U. S. 59;

Thompson v. Boisselier, 114 U. S. 2;

Busel v. Stevens, 137 U. S. 423;

Duff v. Sterling, 107 U. S. 636; 27 L. Ed. 517;

Newton v. Furst, 119 U. S. 373; 30 L. Ed. 442.

Secondary Patents.

That Secondary patents are subject to very strict construction and interpretation is well settled in the law, and this is necessarily becoming more and more necessary and is even going over into invalidity, otherwise there is bound to be great abuse of the patent monopoly. It has well been said:

“But if the advance toward the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each (inventor) is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs.”

Chicago & N. W. Ry. Co. v. Sayles, 97 U. S. 554-557; 24 L. Ed. 1053.

This was the policy and the law many years ago, but, as before herein emphasized, the advance and development in the field of Engineering knowledge and mechanical skill has been so wonderful, that very much of so-called invention must to-day be classified as mechanical skill in the interest of the public and industry.

In *Consolidated v. Barnard*, 156 U. S. 261; 39 L. Ed. 417, it was held that the patent sued on was not a pioneer patent, and is not entitled to that liberality of construction which would have been accorded it had the inventor been the first to devise a scheme for these several adjustments.

A primary invention is "one which performs a **function never performed** by an earlier invention." A secondary invention is "one which performs a **function previously performed**, but in a substantially different way." Walker on Patents (Fourth Ed.), Sec. 359. See:

Western v. Robertson, 142 Fed. 471, 478; 73 L. Ed. A. 587.

Self-Imposed Limitations in Claims.

In view of the law requiring an inventor not only to describe his invention in great detail and the manner and process of making, constructing, compounding and using it, but to "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery," the rule would seem to be self-evident. The claim is the measure of the rights of

the patentee and its limitations are the limitations of his rights. As stated by Judge Townsend, in *Matheson v. Campbell*, 69 Fed. 597, 607:

“No. principle has been more firmly established and consistently applied, in the Federal courts of last resort, than that the patent must be construed in conformity with the self-imposed limitations contained in the claims. The application of this principle of construction may be invoked in support of the validity of the patent as well as in denial of infringement.” Citing:

“*Groth v. Supply Co.*, 9 C. C. A. 507; 61 Fed. 284;

McClain v. Ortmyer, 141 U. S. 419; 35 L. Ed. 800.”

“If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it.”

Shepard v. Carrigan, 116 U. S. 593.

“Complainant is not at liberty now to insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant.”

Morgan v. Albany, 152 U. S. 425; 38 L. Ed. 500.

In the case at bar, the application was rejected. The claims amended and restricted to an “open channel” construction and arrangement, and the attorney argued and emphasized that the “open channel” construction was for an important purpose: “visibility of operation.”

Prior Public Use and Offer for Sale.

The period of two years provided in the Statute was a long and liberal time allowed an inventor to develop an invention. This period has just been recently cut in half, and only one year will be allowed after August, 1940, for an inventor to get his application filed after getting his invention ready for use, or for sale.

In the case of an offer to sell, the Court of Appeals in *Wende v. Horine*, 225 F. 501, 504 (7th Cir.), said:

“If Horine’s letter amounted to an offer to sell the apparatus, then clearly these letters, standing alone, put it ‘on sale’ within the meaning of the Statute to the only immediate prospective customer just as effectively as a distributed price list puts an article on sale to the public.” Cases cited.

On the subject of whether an inventor is justified in delaying more than two years after he makes his invention before he files his application, the courts generally resolve all doubts against the inventor as it is the policy of the law to encourage the inventor to file his application and ultimately to make a prompt disclosure to the general public through his patent.

In the case of *Woodbridge v. United States*, 263 U. S. 50, 56, the Supreme Court says:

“The importance of working out the purpose of Congress of keeping the inventor’s monopoly within the term for which the patent is granted, is thus shown to be capital. Any practice by the inventor and applicant for a patent through which he deliberately and without excuse postpones beyond the date

of the actual invention, the beginning of the term of his monopoly, and thus puts off the free public enjoyment of the useful invention, is an evasion of the Statute and defeats its benevolent aim.”

One must be very careful not to make any publication which is more than the statutory period because this will bar his getting a patent.

In *Wagner et al. v. Meccano Limited* (6th Cir.), 246 Fed. 603, at page 607, we find:

“The manual was a prior ‘printed publication’ within the meaning of section 4886, Rev. Stat. U. S. (Comp. St. 1916, Sec. 9430); and its effect upon the patent in suit is in principle the same as if the manual had been put out by a stranger. *James v. Campbell*, 104 U. S. 356, 382, 26 L. Ed. 786; *Schieble Toy Novelty Co. v. Clark*, 217 Fed. 760, 766, 133 C. C. A. 490 (C. C. A. 6).”

Plaintiffs in this suit issued their printed manual (Bulletin 500) and their “Letter to All Distributors and Agents,” with photographs of the finished machine, more than two years prior to the date of application.

The foregoing case deals with the question of Invention vs. Mechanical Skill, and holds that what was done did not amount to invention.

The application on which the Lensch and Leder patent was issued was filed April 13, 1936.

The evidence clearly shows that the invention had been developed, tested and used in job work in a job shop prior to April 5, 1934; prior to which the photographs were taken, the circulars and manuals were prepared and mailed, and as early as March 17, 1934, Rice wrote

to DeLaval Pacific Company in San Francisco about the gun [Ex. M.] [R. 254-5]; that in February, 1934, he took the gun to San Francisco and exhibited it to Mr. Stoddard; that the agency was established at that time, and "that was in February, 1934." [R. 271.] Mr. Britton confirmed Mr. Rice's testimony about the letter of April 5, 1934, and Bulletin 500, delivered therewith, and Mr. Leder could not but admit that Mr. Rice had to have the gun to exhibit it to "different customers, prospective customers." And he says: "After it was ready and finished and so on, we consented to let him take it out to customers or prospective customers for demonstration" and "permitted him to take it out and have it photographed in order to prepare the circulars for advertising." [R. 236.]

All of this was necessarily prior to April 5, 1934, for it took time to get the photographs, have the electroplates made, and the circulars printed.

Mr. Hicks, the printer, confirmed the delivery of the manuals on April 7th, 1934, and presented a complete copy from his files, marked "Copyright 1934, H. B. Rice." Some sheets of the manual were sent with the letter of April 5, 1934, as per the footnote written by Rice to Britton, and the complete manual was sent later regular mail.

There was thus an abundance of evidence to establish public use and disclosure and offer for sale within the holdings of the decisions on this question.

In *National Biscuit v. Crown Baking Co.*, 105 F. (2d) 422, 425, it is held that substantial completion of the invention two years before is sufficient to start the statutory period under the "use" provision running.

In *Globe Oil Refining Co. v. Sinclair Refining Co.*, 103 F. (2d) 95, 97, it is said:

“We think that our conclusion is further supported by the fact that Bell delayed for nearly two years in filing his application. This would tend to indicate that at the time he developed his improvement he himself did not consider that it involved invention. See *Miller v. National Broadcasting Co.*, 3 Cir., 79 F. (2d) 657.”

That prior public use is a bar to patent whether the use was with or without the consent of the patentee, see

Electric Storage Battery Co. v. Shimadzu, 307 U. S. 19.

In *Maibohn v. R. C. A. Victor Co.* (4th Cir.), 89 F. (2d) 317 (321):

“A number of decisions are to the effect that the statute does not require a complete sale but that placing on sale is sufficient.”

In *American Stainless Steel Co. v. Rustless Iron Corporation*, 71 F. (2d) 404, 407, it is held:

“The rule undoubtedly is that a prior use, in order to negative novelty in a patent, must be something more than an accidental or casual one. It need not have been persisted in, and the thing produced need not have gone into commercial use; but at least the discovery must have gotten beyond the experimental stage and have become complete, and the inventor must have understood and appreciated that it was capable of producing the results sought to be accomplished.” Cases cited.

CONCLUSIONS.

We respectfully submit, therefore, that every one of the defenses which we have presented is good and valid, and is supported by the evidence and the law.

Defendants have developed and supplied to the public and to industry an improvement in metal spray guns which is different in more ways from plaintiffs' gun than it is from the French gun, after which it was designed, and have produced a gun which plaintiffs' own witness Udell described as "a much nicer gun to operate than the Metallizer" which was defendants' earlier gun, and he further said of the Mogul gun "you are more sure it is going to light and operate correctly." [R. 137.] It is a gun which has passed every test of the Underwriters, and when compared with the plaintiffs' gun, it is radically different in design and weight, and it does not provide, nor does it require, an "open channel" construction and arrangement in order to observe the wire and the feed wheels during the operation. Such a construction is of no advantage in defendants' gun.

On the defense of Mechanical Skill only being involved in the patent in suit, and not invention, we submit that the Court should find the claims invalid "as not presenting invention", as found by the Patent Office on the original claims based on **only two prior patents**—Irons and British; whereas the court has had many other prior patents, including the most pertinent French patent and the French gun, Defendants' Exhibits C and N. There can be no question, we submit, that in view of the development of the art and the disclosures not before the Patent Office, that this patent is invalid as not in-

volving invention. The public has rights which must be safeguarded.

On the defense that the patent is a SECONDARY patent, and is limited absolutely to the specific construction and arrangement of a body casting to which the nozzle is attached and supported at one side only, whereby to make possible an open space or channel for the wire feeding wheels and wire, we submit that the evidence is conclusive, and is supported by the specification and claims, and by the arguments used in order to secure the allowance of said restricted claims, and if it is found that there is invention involved, in view of all the prior art, then we submit that such invention is of the most secondary and limited nature, and said claims are not infringed by defendants' Mogul gun, which is of the closed box type, and is far more similar to the old French gun. Any broader construction of the claims would render them invalid on the prior art. The specific construction brought into all the claims alleged to be infringed is for the purpose of providing "means for effecting the visible feed of wire through said wheels comprising **an open channel** in the walls of said member."

On the defense of Prior Public Use and Offer for Sale, we submit that the evidence is sufficient and clear, under the decisions referred to and others with which this Court is no doubt familiar, to hold that said patent is invalid for this reason. The invention was in condition for use and for demonstration, and for photographs from which to prepare the advertising matter, and was fully disclosed and described in the Bulletin 500, and the **manual** printed to describe it, long before the applica-

tion for the patent was filed, namely: prior to February of 1934, whereas the application was not filed until April 13, 1936, several months more than two years allowed by the statute for filing an application after completion. This period of two years was considered most liberal and has now been cut to one year.

We confidently believe that this Honorable Court, with larger experience and knowledge of patent matters and of the law on patents, and in view of the prior art which the Patent Office did not have before it, will hold that the patent is invalid for lack of invention, or because of prior use and actual offer for sale more than two years prior to filing the application.

If the Court does not see its way to go this far, then we believe that the decision of the Court below will be affirmed, which we most respectfully urge.

Appellees' cause is most respectfully submitted for the kindly consideration and decision of this Honorable Court.

Respectfully submitted,

WILLIAM R. LITZENBERG,
Attorney for Defendants.

Los Angeles, California, April 6th, 1942.



No. 10,000.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUDOLPH LENSCH and PAUL LEDER,

Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a corporation, L. E.

KUNKLER, CHARLES BOYDEN and JOSEPH GOSSNER,

Appellees.

APPELLANTS' REPLY BRIEF.

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FILED

APR 22 1942

PAUL P. O'BRIEN,



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APPELLANTS' REPLY BRIEF.

Introduction.

Appellees' (defendants') argument appears to be directed to the following general points which we have gleaned from a reading of the entire brief:

- (a) That mechanical skill only was involved in the claimed subject matter of the patent in suit;
- (b) That the patent in suit is a secondary patent;
- (c) That file wrapper estoppel prevents a construction of the claims broad enough to cover the defendants' gun.
- (d) That there was a constructive abandonment of the invention prior to filing the application.

We will discuss these in the order enumerated.

1. Invention Is Present.

Defendants say that the idea of forming the combustion unit of a gun as a separate and distinct entity from the mechanical unit or power plant of the gun was old in the French patent, Exhibit C [Tr. 442] and that the idea of providing in a spray gun a casting as an integral part which will contain the housing for encompassing the gears of the transmission as well as the turbine for driving the transmission gears, and to so form the casting that it will have a channel way for the feed wire, free and clear of the interiors of the gear and turbine housings was also old many years prior to the application—being most clearly shown, they assert, in the French patent, Exhibit C [Tr. 442] and in the French gun, Exhibit N, etc. (Appellees' brief, p. 3; further comments pp. 5-6, and 37-40.)

An important distinction to be drawn between these prior disclosures and the patent in suit is that in the latter (as well as in the Mogul gun) either unit will function independently of the other, and is separately replaceable, whereas in the prior guns mentioned the gas and air passages are formed in the casting of the gear housing and both units are integral.

Defendants further confuse an open space within a common casting as a channel. In the patented gun and in the Mogul the turbine housing and the gear housing are formed so that either one is fully enclosed by itself, that is by the walls surrounding each mechanism. The gears and shaft are on the side opposite the turbine, and the adjacent walls of each separate compartment or unit form the walls of the open channel.

Defendants *concede* (Brief page 5) that the following from our opening brief, page 5, *correctly describe features of novelty in plaintiffs' patent not found in the prior art*: "The location of knurled wheels which deliver the wire, in an open channel between the wall of the turbine housing and the adjacent wall of the transmission housing." Defendants further confirm this in their brief at page 23 where they say as follows: "The 'open channel' is formed between the housings in the body and the walls thereof, and in that true and actual sense, plaintiffs' gun is the only gun in all the prior art so constructed and arranged."

Defendants would apparently insist that this is nothing more than carrying forward old ideas in an effort to make a more efficient metal spray gun (Brief page 39).

Invention is at best a vague term evading measurement by a strict rule. The Lensch and Leder patented gun obviously involves a certain amount of mechanical skill in its design, but goes beyond that in the creation of a spray gun of higher capacity (more pounds of metal being sprayed in a given time) less maintenance cost, better balanced gun and increased general efficiency, facts which are emphasized by the testimony, in plaintiffs' literature, and confirmed in the advertising literature of the defendants. If Mr. Boyden was in the possession of all his foreign models and prior patent disclosures why did he not improve the *old metallizer gun* which followed that prior art, before he had seen plaintiffs' patented gun? He is an engineer of recognized skill, and were mechanical skill only involved in devising the patented gun he should have produced the Mogul long before he saw the Lensch and Leder patented gun.

He copied the essence of plaintiffs' invention. He probably used some mechanical skill in specifically designing the different parts and embodying them into his gun, but he did not design his gun without being guided almost wholly by the construction of plaintiffs' patent. That should be a sufficient answer to defendants' argument that only mechanical skill was involved.

Bankers' Utilities Co., Inc. v. Pacific Nat. Bank
(C. C. A. 9), 18 Fed. (2d) 16, 18.

This Court has repeatedly recognized *invention* as being present in patents for relatively simple improvements which increase efficiency, notwithstanding the various elements of the combination may be found in the prior art.

Los Alamitos Sugar Co., et al. v. Carrol (C. C. A. 9), 173 Fed. 280;

San Francisco Cornice Co. v. Beyrle (C. C. A. 9), 195 Fed. 516;

H. J. Heinz Co. v. Cohn (C. C. A. 9), 207 Fed. 547.

Moreover, the wide commercial adoption of the patented gun is strongly persuasive of invention,

Sherman-Clay v. Searchlight Horn Co. (C. C. A. 9), 214 Fed. 86, 93,

and the infringer's commercial success also fortifies the presumption of validity of the patent which he infringes.

Dillon Pulley Co. v. McEachran (C. C. A. 6), 69 F. (2d) 144, 146.

2. Patent Is Secondary but Nevertheless Infringed.

As to defendants' second point that the Lensch and Leder patent is secondary, we have affirmatively declared that from the outset. It is unquestionably an improvement patent, and its claims must be narrowly construed. That however does not rob the patent of its effect.

The courts will protect a patentee even in a crowded field, and even when his invention must be restricted essentially to the form shown and described by him, against a copy which seeks with some change in form and position to use the substance of the invention.

Ives v. Hamilton, 92 U. S. 426, 430, 23 L. Ed. 494;

Sanitary Refrigerator Co. v. Winters 280 U. S. 30, 42, 50 S. Ct. 9, 74 L. Ed. 147;

Bankers' Utilities Co., Inc. v. Pacific Nat. Bank (C. C. A. 9), 32 Fed. (2d) 105, 108;

E. H. Bardes Range and Foundry Co. v. American Engineering Co. (C. C. A. 6), 109 Fed. (2d) 696, 698.

3. File Wrapper Does Not Exclude Defendants' Construction.

In their third major proposition defendants discuss the Lensch and Leder file wrapper at length (Appellees' Brief, pp. 8-16). citing law to the effect that a patentee may not secure a construction of his claims covering the same broad territory described by claims rejected and cancelled.

With this rule of law we are in agreement.

We say, however, that the most careful review of the file wrapper does not support the conclusion reached by

defendants, namely that the Mogul gun lacks a construction embodying an open channel between the wall of the turbine housing and the adjacent wall of the transmission housing, with knurled wire feeding wheels located in said open channel.

For the purposes of this argument we may assume that the claims in suit must be restricted substantially to the form shown in the drawings and described in the specification. The Mogul obviously incorporates some change in form and position of parts. Thus the latch in the patent is pivoted in the front, and the latch in the Mogul is pivoted at the rear. The *degree* of visibility differs, *but is present in both*. The physical appearance in general differs in matters of mere design.

This all sums up to the proposition that Mr. Boynden, the designer of the Mogul gun employed his skill merely in giving the outlines of the Mogul gun a modified appearance from the outlines of the patented gun. He did incorporate the improved functional qualities of the patented gun, as he admitted. [Tr. pp. 111 and 112.] In making this change from his old metalizer, Mr. Boyden was required to lengthen the shaft transmitting power from the turbine to the gear housing sufficiently to reach the greater distance caused by placing the channel between the turbine and the gear housing, a feature of construction absolutely copied in the Mogul from the Lensch and Leder patented gun, a comparison of the two physical specimens showing that the shaft in both guns are almost identical in length.

The defendants' advertising literature acknowledged by Boyden [Plaintiffs' Exhibits 10-A, 10-B, 10-C and 10-D; Tr. 71 *et seq.*] is filled with laudatory statements identify-

ing the *construction* of the Mogul in a manner which brings it squarely parallel to the Lensch and Leder *disclosure*.

The whole "file wrapper argument" is disposed of by the simple query: Were the features of similarity between the patented gun and the defendants' gun found in any prior art? The answer is no. Therefore there is nothing to restrict the claims whereby the Mogul gun is excluded from their scope. **The wording of the claims introduced by amendment reads on the Mogul, and therefore in the absence of a construction similar to the Mogul somewhere in the file references, the claims are infringed.**

Inferiority of the defendants' Mogul gun in respect to the *degree of visibility*, and the *size or extent of the open channel* is inconsequential and does not avoid infringement.

Smith Pottery Machine Co. v. Seattle-Astoria Iron Works, et al. (C. C. A. 9), 261 Fed. 85;

Bankers' Utilities Co., Inc. v. Pacific Nat. Bank (C. C. A. 9), *supra*, 32 Fed. (2d) 105, 108.

4. The Defense of Constructive Abandonment Is Not Before This Court.

Under the heading of "DEFENSE OF PRIOR PUBLIC USE AND OFFER FOR SALE," beginning at page 23 of their brief, defendants state that "ONE of the defenses urged by defendants was that the invention of the patent in suit was made and offered for sale more than two years before the filing of the application for patent."

This defense was introduced for the first time by amendment to the answer made by leave of court at the

trial. [Tr. 17a, 150.] The amendment to the answer set forth in the transcript at page 17a and in appellee's (defendants') brief at page 24 is limited to certain particulars therein specified.

The proofs offered by defendants on this subject were discussed by the District Court in its opinion [Tr. pp. 22-25], holding that defendants' evidence on the point "falls far short of the required proof, to establish that the patent invention 'was known and used and circularized and offered for sale' more than two years prior to April 13, 1936, the date of the application therefor." [Tr. p. 24.]

The findings of fact and conclusions of law are wholly silent on this part of the opinion. Defendants presumably prepared the findings of fact and conclusions of law and form of "decree" [judgment] for they were directed to do so by the District Court [Tr. pp. 35-36]; and in any event made no objection to the omission from the findings of fact and conclusions of law and the judgment, of a reference to or finding or conclusion upon this alleged defense.

It is therefore to be inferred that defendants abandoned the defense after learning the District Court's views thereon as expressed in the opinion. In any event we think defendants are now barred from asserting such defense for the reasons stated.

Defendants cite the decision of this Court in *Oliver-Sherwood Co. et al v. Patterson-Ballagh Corp., et al.*,

95 Fed. (2d) 70, to the effect that where patents are held valid but not infringed and plaintiffs appeal and attack the finding of non-infringement, defendants, without a cross appeal, may attack that portion of the findings and decree which holds the patent valid. (Appellee's Brief, pages 25-26.) Incidentally the quotation contained in Appellees' Brief indicated to be the language of the court is merely a copy of a paragraph in the syllabus, but accepting such summary as a fair statement of this Court's holding, it is noted that the decision only permits attack without a cross appeal upon that **portion** of the *findings* and *decree* which holds the patent valid.

While we do not question this Court's right to here consider validity without a cross appeal in the light of prior art referred to in the findings, conclusions of law and judgment, there are no findings or conclusions upon the defense under discussion, and consequently appellees' citation is not authority for the point they urge.

In this connection it should be observed that the prior art patents are before this Court. No question as to their issuance and existence has been raised, whereas the alleged constructive abandonment was held in the District Court's opinion to have failed of proof. Thus any issue on that subject before this Court would not be whether the device alleged to have been made and offered for sale meets the claims of the patent in suit, but primarily whether the evidence is sufficient to establish the making and offering for sale.

As we did not argue the merits of this issue in our opening brief, and do not believe it is before this Court, we have reserved argument thereon for the Appendix, to which reference is requested only if the Court accepts the issue for consideration.

Respectfully,

HERBERT A. HUEBNER,
Attorney for Appellants.

Los Angeles, Cal., April 22, 1942.

APPENDIX.

Should this Court decline to follow us in refusing to consider the alleged defense of constructive abandonment, and without waiving our objection thereto, we submit the following discussion of this subject, which may be disregarded by this Court if the defense is not to be considered.

The Evidence of Defendants Falls Far Short of the Required Proof to Establish That the Patented Invention "Was Known and Used and Circularized and Offered for Sale" More Than Two Years Prior to the Application Therefor.

The application was filed April 13, 1936, and the critical date therefore is April 13, 1934.

In considering this defense several elementary rules of law should be remembered. First, "circularized" is not the pleading of prior publication as required by the statute. A prior writing, drawing or the like must be *published* in order to become effective. Public knowledge, standing alone, works no constructive abandonment. (*Walker on Patents*, Deller's Edition, p. 356, Sec. 89.) Proof of the remaining allegation of "on sale" must show that the offer for sale was a commercial transaction. For instance, where the inventor is obliged to place the invention in the hands of others for crucial experiments he may sell specimens for the purpose and the statute will not apply. (*Walker, supra*, p. 353, *et seq.*)

Proof of prior use, sale, publication, etc., must be made beyond a reasonable doubt.

Barbed Wire Patent Case, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154;

Parker v. Stebler (C. C. A. 9), 177 Fed. 210, 212-213;

Paraffine Companies v. McEverlast, Inc. (C. C. A. 9), 84 Fed. (2d) 335;

and other cases too numerous to mention.

A fatal defect about the defendants' proof was their failure to bring in any physical or documentary evidence of any probative value, and their failure to account for that deficiency. Defendants' two witnesses on this subject not only failed to corroborate each other but were lead into contradictions on both direct and cross-examination which proved their testimony entirely valueless.

WITNESS HARRY D. RICE:

This witness was associated in 1930 or 1931 for approximately eight months with the Metallizing Company of which Mr. Boyden at the time was chief engineer or shop superintendent. [Tr. p. 222.] The witness thereafter became, as he expressed it, connected with the Metal Spray Company as a partner of the plaintiffs herein. The witness volunteered that the spray gun which embodied the features of the patent in suit known as Model 126 was a superior mechanism to the type of gun Model 125 previously manufactured by the Metal Spray Company [Tr. pp. 233-236] and he then made futile attempts to fix the date when the first model 126 was ready to be photographed—whatever that may mean. In such con-

nection he stated [Tr. p. 236] “* * * I would say, the early part of March or the middle or last of February. *I don't* know exactly.” (*Italics ours.*) On the same page, he could not even recall whether more than one gun was manufactured “about that time.” Almost in the next breath (same page) the witness contradicted himself by trying to fix the date not later than March 15th. He did not even state the year and it is only by recourse to the context of his testimony that the year 1934 can be inferred. The witness next attempted to identify a letter dated April 5, 1934, which purportedly was addressed to various distributors and agents but he could not remember the name of a single specific person to whom the letter was sent, if indeed any copies were placed in the mail. [Tr. pp. 237-238.] He immediately follows by saying that one of the letters was sent to Mr. Britton, although he had no independent recollection of that event and could only fix the same in his mind by referring to a long-hand note on the bottom of the letter in question. He did not testify as to when the letter was sent; and there is no presumption of law that a letter is sent on the day of its date. Moreover these were stock letters, and may have been held for weeks.

The witness then attempted to identify a “Bulletin 500.” He admitted [Tr. pp. 239-242] that it was not the one to which the letter referred.

The letter of April 5, 1934, was accepted in evidence, over the objections of counsel for plaintiffs, as Defendants' Exhibit “M.” The Court sustained an objection made by plaintiffs' counsel, that the original bulletin was not produced. The witness thereafter stated [Tr. p. 244] that “Bulletin 500” was prepared “from one of the first models of this type of gun produced.

Parenthetically, we will later show that there was only one specimen gun produced. It was used exclusively for experimental purposes. The first commercial or production gun was placed in the hands of the Shell Oil Company May 17, 1934. [Tr. p. 322.]

The witness Rice states that Bulletin No. 500 was copyrighted by him in 1934. He does not fix the month, and *the copyright registration receipt was not produced* and no explanation or excuse was made for that deficiency.

For the sake of continuity, we here inject some comments of defendants' attorney. Even he was not even prepared to fix any definite dates. This appears from his own statement [Tr. p. 246] as follows:

“* * * in which correspondence the date is *more or less definitely fixed* as to when the gun was ready for shipment.” (Italics ours.)

Still another statement of defendants' counsel is significant when he referred to a carbon copy of a purported letter of March 17, 1934, to De Laval Pacific Company (not in evidence), as

“* * * just a scrap of evidence * * * it may be that the original could be had but I know nothing about it.” [Tr. pp. 253-5.]

The foregoing statement needs no comment.

Counsel immediately thereafter [Tr. p. 253] admitted that the carbon copy of the letter “is not the best evidence,” and the Court remarked that the proof was insufficient except to show the letter as an “office record.” [Tr. pp. 254-255.] There is nothing in the record to indicate the date on which the letter was placed in the mails, if indeed it was mailed, or who mailed it, and no attempt was made

to account for the original which was never produced. Receipt of the letter was never proved. Defendants' counsel thereafter abandoned his attempts to offer the letter in evidence. It was not proved, and is not in evidence, contrary to the statement in Appellees' Brief, page 28.

Again, the witness Rice contradicts himself by saying that the spray gun in question was "practically completed" in December, 1933, or January, 1934. [Tr. p. 271.] The witness thereafter stated that "one of the completed guns," [and we shall hereinafter show that only one gun was ever involved and not at the time witness specified] was shown by him to Mr. George Stoddard of the De Laval Pacific Company at San Francisco, on February 19, 1934. [Tr. p. 271.] It was only by "refreshing his memory" that the witness was able to set the date and the means for such memory refreshment were not disclosed. The details of that alleged disclosure were not given and the only comment made by the witness was stricken by the Court. [Tr. p. 272.] [Mr. Stoddard was not called as a witness, nor his deposition taken.]

To add to the general confusion attending this testimony, the witness further stated that the spray gun in question was

"* * * used in the custom shop for tests for job work on a number of occasions in March, yes, sir."

and that it was used "after" that "on regular job work." [Tr. p. 275.] The first statement is that the gun was used for *tests* which implies experimental use and not public use. No details concerning such alleged use were given and the reasonable inference is that the use, if any,

was a private experimental use. The second portion of the witness' statement to the effect that the gun was used *after that* means nothing more than that it was used at some time. The statement could not be more indefinite as to time and certainly tends to establish nothing in the way of use or date of use.

Cross-examination of the witness Rice utterly destroyed any possible probative value of his testimony which may have been developed during direct examination. The witness could not remember whether the letter [Defendants' Exhibit "M"] had been folded, although it bore creases indicating folding at some time. [Tr. pp. 277-278.] The witness admitted that the letter had not been in his possession since it was allegedly mailed. He did not remember when it was mailed. He was not sure whether he had mailed it personally. [Tr. p. 278.] He was not "certain" who had printed the "Bulletin 500" which is a rather significant omission. [Tr. pp. 278-279.] He later stated that he was only reasonably sure that the printing had been done by the New Method Printing Company. In explanation of his deficient memory, the witness stated:

"We are looking back six years. * * * I would not testify positively." [Tr. p. 279.]

He could not recall the name of the concern that had made the plates for the bulletin [Tr. p. 279], nor the price thereof. He had to speculate as to the number of bulletins printed. [Tr. p. 281.] He admitted having signed a Metal Spray Company check in payment for the printing

but did not remember the amount nor the date of the check. He admitted he had no records when he stated. [Tr. p. 281.]

“I can’t say. My records, you know’ *I don’t have them.*” (Italics ours.)

nor was any attempt made to account for their absence.

To add to that confusion [Tr. p. 281, *et seq.*] the witness stated that in paying for the bulletins he may have obtained sixty or ninety days’ credit or that he “might have” paid cash. He expressed doubt as to whether or not the New Method Printing Company did the printing. He produced a check in the sum of \$26.15, payable to the Carrol Photo Company of Los Angeles, said to cover the photographs which were reproduced in Bulletin No. 500. [The date of that check, it should be noted, is *June 28, 1934*, which is long after the critical date in question.] The witness thereafter reluctantly admitted that he had no way of identifying the particular copy of “Bulletin 500” which he had stated was mailed to Mr. Britton. He could not state the date when copies of Bulletin 500 were deposited in the copyright office, although he believed that such occurred within ten days after the printing order on April 10th or 15th, 1934. He could not remember when he executed the affidavit accompanying the application for copyright registration. He attempted to state what his usual custom was in securing copyrights and then admitted there were “some times exceptions. One gets careless sometimes.” [Tr. p. 288.]

Plaintiffs’ counsel then compelled the witness to produce a check drawn in favor of the New Method Printing Company, in the sum of \$30.00, dated *June 28, 1934*. The witness stated that it may have been for the printing of

“Bulletin 500.” “The records are incomplete.” [Tr. p. 289.]

Plaintiffs’ counsel then developed the fact that certain misunderstandings involving alleged embezzlement by the witness existed between him and the plaintiffs in this action. We invite the Court’s attention to those questions and answers at pages 289 *et seq.* of the record. We believe that the admissions wrung from the witness in that respect show prejudice against the plaintiffs and likewise bias in favor of the defendants by reason of his continuing employment with the Metallizing Company since June 15 of 1938 to the time of the trial. [Tr. p. 292.] The cross-examination on that point was finally terminated by the Court on the basis that the showing of bias had proceeded far enough. [Tr. p. 294.]

The witness whereafter admitted that he could not state whether an answer had been received to the letter, Defendants’ Exhibit “M”, and he failed to state that he or the defendants had made any efforts to establish whether or not an answer had been received or any other history relating to that matter.

As further indication of his unreliability, it should be noted that during his *direct* examination the witness attempted to disparage the merits of the patent in suit by stating generally that it does not involve patentable invention. Against that statement is his admission in a letter written by him to Mr. K. D. Falk during the period when he had an interest in the patent, in which he stated that a patent had been granted on the spray gun in question.

“* * * which we believe protects our unique design against infringement to such an extent that we can adjudicate it fully in the courts, * * *”
[Tr. pp. 296-297.]

Witness William G. Britton:

Defendants made futile attempts to have Mr. Britton corroborate the preceding witness, Rice, although what he was supposed to corroborate was never clear. Britton refused to admit under direct examination that he had received the original letter dated April 5, 1934 [Defendants' Exhibit "M"], although he stated that he had received a similar letter. [Tr. p. 299.] When the witness' attention was directed to the longhand notation appearing on the letter he corrected himself to state that he had received the letter and a circular similar to "Bulletin 500." He could not state positively whether the circular shown him was the one which he had received with the letter. [Tr. p. 300.] He was unable to identify Mr. Rice's handwriting because it was

"* * * several years ago and I don't remember his signature." [Tr. p. 301.]

The significance of Mr. Britton's testimony is his absolute refusal to fix any definite dates and particularly his statement [Tr. p. 302] that he received the letter in question

"in the Spring of 1934 as I remember,"

and likewise that he received one of the spray guns described in Bulletin 500 "in the Spring of 1934". He does not even amplify his statements which are indefinite as to time, with any explanation of what features the gun embodied (and his assertion that it was like one shown in the bulletin is merely a conclusion at best), or that he examined and understood the mechanism of the gun, which is essential, or what he did with the gun, or any of the particulars attending that alleged event.

Witness George Montgomery Hicks:

Another futile attempt was made by defendants to establish definite information regarding the alleged prior knowledge and use, "circularizing" or offer for sale. Hicks stated that he had mimeographed the Manual of Instructions for the Metal Spray Company [Defendants' Exhibit "P"] and that it was completed and delivered on April 7, 1934. The job was paid for by check [Defendants' Exhibit "Q"], dated April 6, 1934. [Tr. pp. 308 *et seq.*]

Under cross-examination, Mr. Hicks admitted he had no independent recollection of the job as it was

"pretty hard to remember six years back * * *."

[Tr. p. 311.]

Mr. Hicks' testimony has no effect whatsoever except possibly to show that the Manual of Instructions was mimeographed at some time. No connection between that fact and anything relevant in respect to alleged prior knowledge and use, circularizing or offer for sale was made, or even attempted.

Witness Ralph A. Brown (for plaintiffs in rebuttal):

Plaintiffs in rebuttal on the alleged special defenses produced Mr. Brown [Tr. pp. 313 *et seq.*], who is the proprietor of the New Method Printing Company referred to by defendants' witness Rice. He stated that the printing job for "Bulletin 500" was paid for by the Metal Spray Company, by check signed by Mr. Rice, dated June 28, 1934, and that the printing had been done no more than 30 days previous to that date. The amount involved was \$30.00. The check was accepted in evidence as Plaintiffs' Exhibit No. 16.

Witness Paul Leder (for plaintiffs):

Mr. Leder was recalled in rebuttal of the alleged special defenses and he established the very interesting and significant fact, and one which refutes a part of the Rice testimony, that only *one experimental spray gun* was produced. [Tr. p. 319.] *The gun at no time was permitted to leave the shop.* Rice had no key to the shop and he could not have had the gun in his possession, and at no time did Leder permit Rice to demonstrate or display the gun. [Tr. pp. 319 *et seq.*]

In that connection, and even assuming that the display of the gun to Mr. Stoddard in San Francisco was actually made at the time Rice said it had been, such display could amount to nothing more than a fraudulent, surreptitious and piratical use of the invention by Rice, and as such would not operate to show an abandonment of the invention by the plaintiffs. It was not, in any event, a "public" use which could even remotely constitute an abandonment of the invention by plaintiffs herein. That doctrine was discussed by the Circuit Court of Appeals of the Second Circuit in *Eastman v. Mayor, etc.*, 134 Fed. 844.

Mr. Leder goes on to state that the first commercial or production spray guns were completed and ready for delivery to customers about the first or the middle of May, 1934, and that time is *subsequent* to the critical date in question. [Tr. pp. 320-321.] Under cross-examination, Mr. Leder denied that Mr. Rice had ever used one of the plaintiffs' spray guns, and testified that

the alleged use was not within the scope of Rice's duties.
[Tr. pp. 322 *et seq.*]

There is actually no conflict in the evidence when considered as a whole, including the testimony adduced by both plaintiffs and defendants, to indicate anything more than *experimental* or *test* use. No attempt was even made by defendants, as aforesaid, to show that any possible use thereof was a *public* use. The circumstances were never disclosed or discussed by defendants' witnesses and we are not warranted in speculating as to what might have happened but as to which no testimony was adduced. *The record is entirely bare of any credible testimony or evidence that the one metal spray gun was subjected to anything more than a private or experimental use more than two years prior to the filing of the application for the patent in suit.*

In summation of the defendants' feeble attempts to prove a prior public knowledge and use, circularizing and offer for sale, we are impressed with the rather obvious fact that defendants themselves had very little confidence in that defense. It should be remembered that defendants did not even specifically plead the defense and did not comply with the statute in giving plaintiff thirty days notice thereof prior to trial. It was upon that objection that the Court permitted an amendment to the complaint to incorporate the defense and adjourned court for one day in order to enable plaintiffs to make any necessary preparations to meet the additional defense. An exception was permitted plaintiffs and it is debatable whether or not the

Federal Rules of Civil Procedure abrogate or supersede the statute. The point is of relatively slight importance because of the inadequacy of defendants' attempted proofs on the subject. We take the position that there is not one scrap of evidence or of testimony in the record which is worthy of any credence or which has any real probative value. Conviction on that score would inevitably result when the clear law on the subject and the standard of evidence required are considered.

Respectfully,

HERBERT A. HUEBNER,
Attorney for Appellants.

Los Angeles, Cal., April 22, 1942.



No. 10,000

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUDOLPH LENSCH and PAUL LEDER,

Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a corporation, L.
E. KUNKLER, CHARLES BOYDEN and JOSEPH GOSSNER,

Appellees.

PETITION FOR REHEARING.

HERBERT A. HUEBNER,
520 Title Insurance Building, Los Angeles,
Attorney for Petitioners and Appellants.

FILED

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No. 10,000

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RUDOLPH LENSCH and PAUL LEDER,

Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a corporation, L.

E. KUNKLER, CHARLES BOYDEN and JOSEPH GOSSNER,

Appellees.

PETITION FOR REHEARING.

*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit:*

Your petitioners, appellants in this cause, respectfully petition this Honorable Court under Rule 25 for a rehearing of the appeal hereon decided June 3, 1942.

The grounds upon which rehearing is sought are as follows:

1. The opinion of the Court refers to an unrelated case, *Emmett v. Metals Processing Corporation*, 9 Cir., 118 Fed. (2d) 796, wherein it was held that a patent there in suit relating to a feature of metal spraying was invalid, and this Court apparently therefrom links welding and metal spraying as a common art of considerable antiquity. Weld-

ing is the joining by fusion of two similar metals. Metal spraying is not comparable to welding. Metal spraying is the melting and atomizing of metal and driving the metal particles with considerable velocity onto a prepared but not preheated surface of metal, stone, wood, fiber, or other substances. The record would indicate that this process was not known prior to about 1915.

2. The Court gave an effect to the Morf patent No. 1,128,175 issued February 9, 1915, beyond that to which it is entitled under law established by the United States Supreme Court. In holding the Lensch and Leder patent invalid, this Court said in its opinion:

“Appellant’s patent shows no discovery in the art which had not been disclosed by Morf, that is, the melting of a rod by a flame and the blowing of the molten metal by compressed air.”

The Morf patent disclosed and claimed a *method* or *process*. It did not show a complete spray gun nor the parts therefor. The effect of this Court’s reference herein quoted is to bar from patent protection an improved device or machine for carrying out a previously known process, which we respectfully say, is contrary to *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 261 U. S. 45, 67 L. Ed. 523, wherein the Supreme Court found invention present in an improvement in a paper making machine which differed only to the extent that it speeded up production and produced a more uniform sheet of paper, otherwise following the old process. Appellant’s

patented spray gun by reason of the construction defined in the claims is able to operate at a much higher rate of speed than previous guns, and the Mogul gun of appellees which is a copy of the patented gun achieves the same advantage. At page 128 of the transcript of record Mr. Charles Boyden, vice president of Metallizing Company of America, appellee, testified as follows:

“Q. Do you get better and more satisfactory results by the Mogul than you do with the metallizer?
A. It is faster.

Q. What do you mean by that? A. It sprays more metal in a given time.

Q. Is that the only advantage? A. That is a sufficient advantage.”

3. In holding that it was not invention for appellants to change the shape or form of the housing, or to make one housing into two, this Court apparently relied upon the general rule applicable where no new result is seen. There are exceptions to this rule, where speed of operation, efficiency and safety are achieved, which exceptions we respectfully submit, should have been considered by this Court in the light of the fact that the patented spray gun has increased speed of operation, efficiency and safety.

The British patent No. 268,431 referred to in the opinion of the Court has two housings completely separated and remote from each other, the power from the turbine being conveyed through a flexible shaft to the wire feeding mechanism. The U. S. patent No. 1,917,523 referred

to in the opinion of the Court illustrates a box type single housing. Neither of the disclosures suggests a modification of the other which would result in the form of housing specified in appellants' patent. Neither of these prior patents have an open channel between two housings providing for dissipation of gases outside of the housings, which is one of the primary structural features enabling the patented gun and the Mogul gun to operate much faster than the guns of the prior art. As seen from the physical exhibits, the patented gun and the Mogul gun will operate with a relatively large wire (.125 of an inch) whereas the prior art guns such for example as the physical embodiment of the old French gun would accommodate only about .040 to possibly .060 or .070 inch. The difference in diameter results in a substantial difference in volume of metal sprayed.

Such results, though involving slight changes in form, have uniformly been held by the United States Supreme Court to be evidence of invention.

Eibel Process Co. v. Minnesota and Ontario Paper Co., supra;

George Krementz v. The S. Cottle Co., 148 U. S. 556, 37 L. Ed. 558;

Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

4. The Court in its opinion did not accord the Lensch and Leder patent the support which is given to the presumption of validity by the fact that the accused Mogul gun is a copy of the patented gun. (See *Steiner Sales Co. v. Schwartz Sales Co.*, 10 Cir., 98 Fed. (2d) 999, 1003 (point 4), citing *Kurtz v. Belle Hat Lining Co.*, 2 Cir., 280 Fed. 277.)

5. The Court in its opinion made no reference to appellants' request for a special allowance for costs incurred in printing the unnecessary parts of the record pursuant to appellees' designation for reasons set forth in appellants' opening brief, page 11, and prayer in the conclusion, page 39. It was contended by appellants that appellees required the printing of a large amount of testimony unnecessary to a consideration of the points on appeal and that a special allowance of costs should be made in favor of appellants therefor.

Respectfully submitted,

RUDOLPH LENSCH and

PAUL LEDER,

Petitioners and Appellants,

By HERBERT A. HUEBNER,

Attorney for Petitioners and Appellants.

Los Angeles, California.

July 1, 1942.

Certificate of Counsel.

The undersigned counsel certifies that in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

HERBERT A. HUEBNER,

Counsel for Petitioners and Appellants.



No. 10084

United States
Circuit Court of Appeals

For the Ninth Circuit.

CALIFORNIA CENTURY COMPANY, a California Corporation, and RAYMOND LEWIS, doing business as Lewis Construction Company,
Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

MAY 11 1942

PAUL P. O'BRIEN,



United States
Circuit Court of Appeals

For the Ninth Circuit.

CALIFORNIA CENTURY COMPANY, a California Corporation, and RAYMOND LEWIS, doing business as Lewis Construction Company,
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vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central Division.

No. 1167 R J. Civil

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a national banking association,
Plaintiff,

vs.

CALIFORNIA CENTURY CORPORATION, a
California corporation, RAYMOND LEWIS,
doing business as Lewis Construction Company,
and PAUL W. SAMPSELL, Trustee of the
Estate of Raymond Lewis, Debtor, a Bankrupt,
Defendants.

COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER OF SHARES OF STOCK.

Plaintiff complains and alleges:

I.

That plaintiff is a national banking association organized and existing under the laws of the United States of America with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

That defendant, California Century Company, was at all times herein mentioned and now is a corporation organized and existing under the laws

of the State of California having its principal place of business in the County of Los Angeles, State of California.

III.

That on the 29th day of April, 1940, an involuntary petition for the adjudication in bankruptcy of the defendant, Raymond Lewis, doing business as Lewis Construction Company, was filed in the District Court of the United States, Southern District of California, Central Division, case No. 36226 C, and that thereafter the defendant, Paul W. Sampsell, was appointed and now is Receiver in Bankruptcy of the Estate of said Raymond Lewis, doing [2] business as Lewis Construction Company, a bankrupt; that among the assets of said estate is listed a total of 268,132 shares of capital stock of Amusement Enterprises, Inc.

IV.

That on or about the 9th of January, 1939, plaintiff, as lessor, made a lease of certain real property to said California Century Corporation, as lessee; that said lessee failed and refused to pay certain amounts due under said lease and that thereafter the plaintiff instituted an action against said lessee; that thereafter, on the 20th day of March, 1940, in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, judgment was rendered and entered in favor of plaintiff and against said California Century Corporation, as defendant, for amounts due on said

lease in the sum of \$870.00 principal, \$50,000 attorney's fees, \$22.30 interest and costs in the sum of \$6.00.

V.

That on or about the 22nd day of April, 1940, an execution was issued upon said judgment against the property of said California Century Corporation addressed to the Marshal of the City of Los Angeles, County of Los Angeles, State of California, and that said execution has been returned by the said Marshal entirely unsatisfied.

VI.

That plaintiff is informed and believes and therefore alleges that defendant, Raymond Lewis, doing business as Lewis Construction Company, was at all times herein mentioned and now is an officer, to-wit, the President of said California Century Corporation and that at all times herein mentioned, said Raymond Lewis, doing business as Lewis Construction Company, was and now is the principal stockholder of said corporation.

VII.

That plaintiff is informed and believes and, basing its allegations upon such information and belief, alleges that on or [3] about the 9th day of November, 1939, the said California Century Corporation transferred and assigned all of its assets to Amusement Enterprises, Inc. and received therefor, in consideration of said transfer and assign-

ment, shares of capital stock of said Amusement Enterprises, Inc. in the amount of approximately 268,132 shares.

VIII.

That plaintiff is informed and believes and, basing its allegations upon such information and belief, alleges that thereafter and subsequent to the 11th day of January, 1939, and for the purpose of defrauding its creditors and particularly plaintiff herein, the said California Century Corporation transferred and assigned all of said shares of stock of Amusement Enterprises, Inc. in the approximate amount of 268,132 shares to the defendant herein, Raymond Lewis, doing business as Lewis Construction Company; that the purported consideration received by said California Century Corporation for said assignment and transfer of said stock was the assignment and transfer to said California Century Corporation by the defendant, Raymond Lewis, doing business as Lewis Construction Company, of approximately 1380 shares of capital stock of said California Century Corporation; that at the time of said transaction, the capital stock of said California Century Corporation was valueless for the reason as hereinabove alleged that said corporation had theretofore transferred and assigned all of its assets to said Amusement Enterprises, Inc.; that at the time of said transaction, said California Century Corporation had no assets whatsoever except its interest in said capital stock of Amusement Enterprises, Inc. in the approximate amount of 268,132

shares; that said California Century Corporation was rendered insolvent by said transaction and ever since has been and now is insolvent; that said transfer of the capital stock of Amusement Enterprises, Inc. to Raymond Lewis, doing business as Lewis Construction Company, was made with the intent and for the purpose of defrauding plaintiff of the money so due it and of preventing it [4] from collecting the same and that said Raymond Lewis participated in said fraudulent intent and took the said transfer and assignment of said shares of stock of Amusement Enterprises, Inc. with the intent and for the purpose of assisting and aiding said California Century Corporation in evading payment of said indebtedness and for the purpose of preventing plaintiff from collecting same; that plaintiff was, prior to the time of said transfer and assignment and ever since has been, and now is a creditor of said California Century Corporation.

IX.

That plaintiff is informed and believes and, upon such information and belief, alleges that the said California Century Corporation has no property other than the said shares of stock in Amusement Enterprises, Inc. in the approximate amount of 268,132 shares, as set out in this complaint, from which the plaintiff's said execution can be satisfied in whole or in part; and that unless the said shares of stock in Amusement Enterprises, Inc., in the approximate amount of 268,132 shares, or a sufficient

portion thereof, can be applied to the payment of the said judgment in favor of plaintiff, the same must remain wholly unpaid.

X.

That on the 28th day of August, 1940, Hugh L. Dickson, Referee in Bankruptcy in the matter of Raymond Lewis, doing business as Lewis Construction Company, Debtor, made his order permitting plaintiff to institute proceedings in the District Court of the United States, Southern District of California, Central Division, against the defendant, Raymond Lewis, Debtor in said bankruptcy proceedings, and against the defendant, Paul W. Sampsell, Receiver in said bankruptcy proceedings, for the purpose of setting aside the alleged fraudulent conveyances herein mentioned.

Wherefore, plaintiff prays:

1. That the said assignment of approximately 268,132 [5] shares of stock by California Century Corporation to Raymond Lewis, doing business as Lewis Construction Company, and that the assignment by operation of law from said Raymond Lewis, doing business as Lewis Construction Company, to defendant, Paul W. Sampsell, Receiver in Bankruptcy of the Estate of Raymond Lewis, doing business as Lewis Construction Company, bankrupt, be declared fraudulent and void and of no effect and that said shares of stock be adjudged and decreed to be the property of defendant, California Century Corporation.

2. For such other and further relief as to the court may seem equitable.

HELGOE AND HART

By **HOWARD W. HART**

Attorneys for plaintiff [6]

United States of America
Southern District of California
Central Division—ss.

J. A. Carter being by me first duly sworn, deposes and says: that he is the Assistant Vice-President of the plaintiff, Security-First National Bank of Los Angeles in the above entitled action; that he has read the foregoing Complaint to Set Aside Fraudulent Transfer of Shares of Stock and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

J. A. CARTER

Subscribed and sworn to before me this 18th day of September, 1940.

[Seal] **HOWARD W. HART**

Notary Public in and for the County of Los Angeles, State of California.

Served on Raymond Lewis 10/1/40

[Endorsed]: Filed Sep. 18, 1940. [7]

[Title of District Court and Cause.]

ANSWER OF CALIFORNIA CENTURY
COMPANY.

Comes now California Century Company, sued herein as California Century Corporation, and for itself only, and not for or on behalf of any other defendant, in answer to plaintiff's complaint, admits, alleges and denies as follows:

I.

This defendant admits the allegations of Paragraph 1 of plaintiff's complaint.

II.

Answering Paragraph II of plaintiff's complaint, this defendant denies the allegations thereof, and alleges that this defendant's name is California Century Company, and that it is a [8] corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business in the County of Los Angeles.

III.

This defendant admits the allegations of Paragraphs III, IV and V of plaintiff's complaint.

IV.

This defendant denies the allegations of Paragraph VI and alleges that defendant Raymond Lewis was and is the president of the California

Century Company, defendant herein, and was and is one of the stockholders thereof.

V.

This defendant denies generally and specifically the allegations of Paragraph VII of plaintiff's complaint.

VI.

In answer to Paragraph VIII of plaintiff's complaint, this defendant denies that on the 11th day of January, 1940, or subsequent thereto, or at any other time, this defendant, for the purpose of defrauding its creditors, or for the purpose of defrauding any creditor, transferred and or assigned 268,182, or any number of shares, of stock of the Amusement Enterprises, Inc. to Raymond Lewis, doing business as Lewis Construction Company, or to any other person. Denies that the consideration received by this defendant for said assignments and transfer of stock was the assignment and or transfer to this defendant by said defendant Raymond Lewis of 1870 shares of stock of this defendant corporation. Denies at that time the capital stock of this defendant corporation was valueless. Denies that this defendant had transferred and or assigned all of its assets to said Amusement Enterprises, Inc. Denies that at the time of said transaction this defendant had no assets other than the capital stock in the Amusement Enterprises, Inc. Denies that this defendant was rendered insolvent by said [9] transaction. Denies that it ever since has been in-

solvent. Denies that said transfer of capital stock, or any transfer, to Raymond Lewis doing business as Lewis Construction Company was made with the intent and/or for the purpose of defrauding plaintiff or any other creditor of any money due it or any creditor, or for the purpose of preventing plaintiff, or any other creditor from collecting same. Denies that said defendant Lewis participated in any fraudulent intent, or that this defendant participated in any fraudulent intent. Denies that said defendant Lewis took said transfer and or assignment of said shares of stock, of the Amusement Enterprises, Inc., with the intent and/or for the purpose of assisting and aiding, or assiting or aiding this defendant in evading payment of any indebtedness due to this plaintiff or for the purpose of preventing plaintiff from collecting same. Denies that this plaintiff was prior to the time of said transfer and or assignment a creditor of this defendant.

VII.

This defendant denies generally and specifically the allegations of Paragraph IX of plaintiff's complaint.

VIII.

Answering the allegations of Paragraph X of plaintiff's complaint, this defendant has no information or knowledge as to the allegations thereof, and had no knowledge or notice thereof, and alleges that if said order permitting plaintiff to institute these proceedings was made, said order was made ex

parte, without any knowledge on the part of this defendant, and without any notice, and that said order is invalid and void.

Wherefore, this defendant prays that plaintiff may take nothing by reason of its complaint on file herein, for costs herein incurred, and for such other and further relief [10] as the court may deem meet and proper in the premises.

JOSEPH MUSGROVE,

F. O. McGIRR.

THOS. H. CANNAN,

By JOS. MUSGROVE,

Attorneys for defendant, California Century Company.

State of California,
County of Los Angeles—ss.

Raymond Lewis being by me first duly sworn, deposes and says: that he is the President of the California Century Company, a corporation, and makes this verification for and on *behalf corporation* defendant in the above entitled action; that he has heard read the foregoing Answer of California Century Company and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ RAYMOND LEWIS

Subscribed and sworn to before me this 14 day of October, 1940.

[Seal] ALICE B. RANDOLPH

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 18, 1940. [11]

[Title of District Court and Cause.]

ANSWER OF LEWIS CONSTRUCTION
COMPANY.

Comes now Raymond Lewis doing business under the fictitious firm name of Lewis Construction Company, defendant in the above entitled action, and for himself and not for or on behalf of any other defendant, admits, alleges and denies as follows:

I.

This defendant admits the allegations of Paragraphs I and III of plaintiff's complaint.

II.

In answer to Paragraph II of plaintiff's complaint, this defendant alleges that defendant sued herein as California [12] Century Corporation, the true name of said corporation is California Century Company.

III.

This defendant admits the allegations of Paragraphs IV and V of plaintiffs' complaint.

IV.

This defendant admits the allegations of Paragraph VI of plaintiff's complaint, except that the true name of said corporation is California Century Company, and that he is one of the large stockholders thereof.

V.

This defendant denies generally and specifically the allegations of Paragraph VII of plaintiff's complaint.

VI.

In answer to Paragraph VIII of plaintiff's complaint, this defendant denies subsequent to the 11th day of January, 1940, for the purpose of defrauding its creditors, or for any other purpose, the California Century Company transferred and/or assigned all of the shares of stock of the Amusement Enterprises, Inc. to the defendant Raymond Lewis. Denies that the consideration received for the said assignment and transfer or for the assignment or transfer of said stock by the California Century Company was 1380 shares of the capital stock of said California Century Company. Denies that the capital stock of the California Century Company was valueless, at the time of said transaction, or at any other time. Denies that said corporation transferred and/or assigned all of its assets to said Amusement Enterprises, Inc. Denies at the time of said transaction said California Century Company had no assets whatever, excepting its interest in the

capital stock of the Amusement Enterprises, Inc. Denies that said California Century Company was rendered insolvent by said transaction. Denies that said transfer of said capital stock of the Amusement Enterprises, Inc. to this [13] defendant was made with intent and/or for the purpose of defrauding plaintiff, or any creditor, of money due it or them. Denies it deprived it from collecting same. Denies that this defendant participated in said fraudulent intent, or any fraudulent intent. Denies that this defendant took said transfer and/or assignment of said shares of stock of the Amusement Enterprises, Inc. with intent and/or for the purpose of aiding and/or assisting said California Century Company in evading payment of its debts to this plaintiff or its creditors, or for the purpose of preventing plaintiff or any creditor from collecting same. Denies that plaintiff prior to the time of said transfer and assignment or transfer or assignment was a creditor of the California Century Company.

VII.

This defendant denies each and every allegation of Paragraph IX of plaintiff's complaint.

VIII.

In answer to Paragraph X of plaintiff's complaint, this defendant had no information, knowledge or notice of an order made by Hugh L. Dickson, Referee in Bankruptcy, and if same was made it was made *ex parte* without notice to this defendant, and that same is void and invalid.

Wherefore, this defendant prays that plaintiff may take nothing by reason of its complaint on file herein, for costs herein incurred and for such other and further relief as the Court may deem meet and proper.

JOSEPH MUSGROVE,
F. O. McGIRR,
THOS. H. CANNAN,

By JOS. MUSGROVE,

Attorneys for Defendant Raymond Lewis doing business as
Lewis Construction Company.

[14]

State of California,
County of Los Angeles—ss.

Raymond Lewis being by me first duly sworn, deposes and says: that he is the defendant in the above entitled action doing business under the fictitious firm name of Lewis Construction Company, defendant in the above entitled action; that he has heard read the foregoing Answer of Lewis Construction Company and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

RAYMOND LEWIS

Subscribed and sworn to before me this 14 day of October, 1940.

[Notarial Seal] ALICE B. RANDOLPH

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 18, 1940. [15]

[Title of District Court and Cause.]

MEMORANDUM DECISION.

Helgoe & Hart by Howard W. Hart, Esquire, of Los Angeles, California, for Plaintiff.

Rupert B. Turnbull, Esquire, of Los Angeles, California, for Paul W. Sampsel, Receiver.

Joseph Musgrove, Esquire, of Los Angeles, Calif. for Raymond Lewis, doing business as Lewis Construction Company, and for California Century Corporation, (Company).

O'Connor, J. F. T., District Judge.

The court finds that the assignment of approximately 268,132 shares of stock by the California Century Company to Raymond Lewis, doing business as Lewis Construction Company, and the assignment by operation of law from said Raymond Lewis, doing business as Lewis Construction Company to defendant, Paul W. Sampsell, receiver in Bankruptcy of the estate of Raymond Lewis, doing business as Lewis Construction Company, bankrupt,

was fraudulent and void and of no effect, and the court further finds that the said shares of stock are the property of defendant, California Century Company. Costs will be allowed the plaintiff.

Dated September 5, 1941.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Sep. 5, 1941. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

The above entitled cause came on regularly for trial on the 3rd day of June, 1941, before the Court, sitting without a jury, the Honorable J. F. T. O'Connor, Judge Presiding, Helgoe and Hart, by Howard W. Hart, appearing as attorneys for the plaintiff, Security-First National Bank of Los Angeles, Joseph Musgrove, F. O. McGirr and Thos. H. Cannan, by Joseph Musgrove, appearing as attorneys for the defendants, California Century Company and Raymond Lewis, doing business as Lewis Construction Company, and Rupert B. Turnbull appearing as attorney for the defendant, Paul W. Sampsell, Receiver in Bankruptcy of the Estate of Raymond Lewis, doing business as Lewis Construction Company, a Bankrupt, and evidence, both oral and written, having been introduced and the

cause submitted for decision, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

I.

That plaintiff is a national banking association organized and existing under and by virtue of the laws of the United States of [17] America with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

That defendant, California Century Company, was at all times herein mentioned and now is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

III.

That on or about April 29, 1940 an involuntary petition in bankruptcy was filed against the defendant, Raymond Lewis, doing business as Lewis Construction Company; that said bankruptcy proceedings were at all times thereafter and are in the District Court of the United States, Southern District of California, Central Division, case No. 36226-C.

IV.

That thereafter and prior to the institution of this action the defendant, Paul W. Sampsell, was

appointed Receiver in said bankruptcy proceedings of the estate of said Raymond Lewis, doing business as Lewis Construction Company, a bankrupt, and at all times since has been and now is said Receiver.

V.

That among the assets of said estate are 268,132 shares of capital stock of Amusement Enterprises, Inc., and that the defendant, Paul W. Sampsell, holds said shares of stock as such Receiver.

VI.

That from and continuously after January 9, 1939 plaintiff has been and now is a creditor of the defendant, California Century Company.

VII.

That on or about March 19, 1940 plaintiff obtained a judgment against the defendant, California Century Company, in the [18] Municipal Court of the City of Los Angeles in the amount of \$949.30, case No. 537,104.

VIII.

That on or about May 3, 1940 the Marshal of the City of Los Angeles made a nulla bona return of execution on said judgment, and that said judgment is entirely unsatisfied.

IX.

That at all times herein mentioned defendant, Raymond Lewis, has been and now is the president and a director of the defendant, California Century Company.

X.

That at all times herein mentioned defendant, Raymond Lewis, has been and now is the president and a director of Amusement Enterprises, Inc., which is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

XI.

That the total outstanding shares of stock of California Century Company during all times herein mentioned were and are 2500 shares; that at the time plaintiff became a creditor of defendant, California Century Company, to-wit, on January 9, 1939, and at all times thereafter said Raymond Lewis has been the owner of all of the shares of stock of said corporation, except two shares which were purportedly owned by other directors.

XII.

That subsequent to the time plaintiff became a creditor of said defendant, California Century Company, and pursuant to a permit issued by the Corporation Commissioner of the State of California, dated January 11, 1939, said defendant, California Century Company, conveyed, transferred and assigned all of its assets, both real and personal, with the exception of a certain parcel of real property [19] referred to as the "parking lot", to Amusement Enterprises, Inc. in exchange for 268,132

shares of capital stock of Amusement Enterprises, Inc.

XIII.

That subsequently all of the shares of stock so acquired by defendant, California Century Company, in exchange for the assets so transferred to Amusement Enterprises, Inc., to-wit, the sum of 268,132 shares of stock in Amusement Enterprises, Inc., were transferred to defendant, Raymond Lewis, doing business as Lewis Construction Company.

XIV.

That there was in fact no valuable consideration for the said transfer of said shares of stock of Amusement Enterprises, Inc. from California Century Company to defendant, Raymond Lewis, doing business as Lewis Construction Company.

XV.

That the said transfer of said shares of stock of Amusement Enterprises, Inc. to defendant, Raymond Lewis, doing business as Lewis Construction Company, rendered the defendant, California Century Company, insolvent.

XVI.

That there was in fact no immediate delivery of said shares of stock of Amusement Enterprises, Inc. to defendant, Raymond Lewis, doing business as Lewis Construction Company, at the time of said transfer, nor was said transfer followed by any

actual or continued change of possession of said shares of stock.

XVII.

That the said transfer of said shares of stock in Amusement Enterprises, Inc. to defendant, Raymond Lewis, doing business as Lewis Construction Company, was voluntary and was made for the purpose of defrauding creditors of defendant, California Century Company; that defendant, Raymond Lewis, doing business as Lewis [20] Construction Company, knew the facts pertaining to said transfer, knew at the time of said transfer that defendant, California Century Company, would be rendered insolvent by said transaction, knew that said transfer was being made for the purpose of defrauding creditors of California Century Company.

CONCLUSIONS OF LAW.

I.

That the transfer of 268,132 shares of stock in Amusement Enterprises, Inc. from California Century Company to Raymond Lewis, doing business as Lewis Construction Company, and the assignment of said shares of stock by operation of law from defendant, Raymond Lewis, doing business as Lewis Construction Company, to defendant, Paul W. Sampsell, Receiver in Bankruptcy of the Estate of Raymond Lewis, doing business as Lewis Construction Company, a bankrupt, were fraudulent and void as against Security-First National Bank of Los

Angeles, plaintiff herein, and such transfers, and each of them, should be and are annulled and set aside; that the said shares of stock are the property of the defendant, California Century Company.

II.

That plaintiff shall have judgment against defendants, California Century Company, a California corporation, and Raymond Lewis, doing business as Lewis Construction Company, for its costs incurred herein.

Let Judgment Be Entered Accordingly.

Dated: Oct. 10, 1941.

J. F. T. O'CONNOR,

Judge. [21]

The foregoing Findings of Fact and Conclusions of Law are approved as to form.

JOSEPH MUSGROVE,

F. O. McGIRR and

THOS. H. CANNAN

By.....

Attorney for California Century Company and Raymond Lewis

RUPERT B. TURNBULL,

Attorney for Paul W. Sampsell.

[Endorsed]: Filed Oct. 10, 1941. [22]

In the District Court of the United States for the Southern District of California, Central Division.

No. 1167 O'C. Civil

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,
Plaintiff,

vs.

CALIFORNIA CENTURY COMPANY, a California corporation, RAYMOND LEWIS, doing business as Lewis Construction Company, and PAUL W. SAMPSELL, Trustee of the Estate of Raymond Lewis, Debtor, a Bankrupt,
Defendants.

JUDGMENT.

The above entitled cause came on regularly for trial on the 3rd day of June, 1941, before the Court, sitting without a jury, the Honorable J. F. T. O'Connor, Judge Presiding, Helgoe and Hart, by Howard W. Hart, appearing as attorneys for the plaintiff, Security-First National Bank of Los Angeles, Joseph Musgrove, F. O. McGirr and Thos. H. Cannan by Joseph Musgrove, appearing as attorneys for the defendants, California Century Company and Raymond Lewis, doing business as Lewis Construction Company, and Rupert B. Turnbull appearing as attorney for the defendant, Paul W.

Sampsell, Receiver in Bankruptcy of the Estate of Raymond Lewis, doing business as Lewis Construction Company, a Bankrupt, and evidence, both oral and documentary, having been introduced, and the cause having been submitted for decision, and the court having made its Findings of Fact and Conclusions of Law,

It is hereby ordered, adjudged and decreed that the assignment of shares of stock in Amusement Enterprises, Inc. from California Century Company to Raymond Lewis, doing business as Lewis Construction Company, in the amount of 268,132 shares, and the [24] assignment of said shares of stock by operation of law from defendant, Raymond Lewis, doing business as Lewis Construction Company, to defendant, Paul W. Sampsell, Receiver in Bankruptcy of the Estate of Raymond Lewis, doing business as Lewis Construction Company, a bankrupt, were fraudulent and void as against Security-First National Bank of Los Angeles, plaintiff herein, and such transfers and each of them, should be and are annulled and set aside, and the said shares of stock are the property of the defendant, California Century Company.

It is further ordered, adjudged and decreed that plaintiff, Security-First National Bank of Los Angeles, shall have judgment against the defendants, California Century Company, a California corporation, and Raymond Lewis, doing business as Lewis

Construction Company, for its costs incurred herein taxed in the amount of \$63.40.

Dated: Oct. 10, 1941.

J. F. T. O'CONNOR

Judge

Judgment entered Oct. 10, 1941.

Docketed Oct. 10, 1941.

Book C O 7 Page 85.

R. S. ZIMMERMAN, Clerk,
By FRANCIS E. CROSS, Deputy.

[Endorsed]: Filed Oct. 10, 1941. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that the California Century Company, a California corporation, and Raymond Lewis, doing business as Lewis Construction Company, Defendants above named, hereby appeal to the Circuit Court of Appeal for the Ninth Circuit from the final judgment entered in this action on October 10, 1941.

JOS. MUSGROVE

Attorney for Appellants California Century Company, a California corporation and Raymond Lewis, doing business as Lewis Construction Company.

[Endorsed]: Filed Dec. 30, 1941. Mailed copy to Plf's. Atty. & to Atty. for Trustee. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy. [27]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 31 inclusive contain full, true and correct copies of Complaint; Answer of California Century Company; Answer of Lewis Construction Company; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond for Costs on Appeal; Designation of Record on Appeal and Order for Transmittal of Original Exhibits, which together with the Reporter's Transcript of Testimony and the Original Exhibits constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$5.60 and that the said amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 11th of March, A. D. 1942.

[Seal]

R. S. ZIMMERMAN, Clerk,

By: EDMUND L. SMITH,

Deputy

[Title of District Court and Cause.]

TESTIMONY

RAYMOND LEWIS.

Direct Examination.

Q. By Mr. Hart: What is your name?

A. Raymond Lewis.

The Court: I think, Mr. Clerk, you had better swear Mr. Lewis, because while he was sworn yesterday I am not sure that was the same proceeding.

(Thereupon the witness was sworn by the clerk.)

Q. By Mr. Hart: State your full name.

A. Raymond Lewis.

Q. Are you president of the defendant California Century Company? A. Yes.

Q. Were you the president of that company during the [10] years 1939 and 1940?

A. During 1940 I was president, and I think during the whole year 1939 I was president.

Q. Were you a director during those two years?

A. Yes, I was.

Q. Are you also the president of the Amusement Enterprises, Incorporated? A. Yes.

Q. Were you president of that corporation in 1939? A. Yes.

Q. And in 1940? A. Yes.

Q. And were you a director of that corporation during those years? A. Yes.

Q. And were you a stockholder of the California Century Company? A. Yes.

(Testimony of Raymond Lewis.)

Q. How many shares do you own, at the present time?

Mr. Musgrove: I object to that as irrelevant, incompetent and immaterial.

Q. By Mr. Hart: All right. How many shares did you own on January 9, 1939?

A. Approximately 1,100, as I recall.

Q. Did you a short time prior to that own all the stock of the corporation? [11]

A. During the year 1938 I owned all but—or rather during part of that year I owned all but two shares, the way I recall it.

Q. How many shares of stock were issued by that corporation? A. 2,500 shares.

The Court: Now you are talking about the California Century Corporation.

The Witness: The California Century Corporation.

Q. By Mr. Hart: Shortly prior to the 1st of January, 1939 you owned all but two shares of the capital stock of the California Century Company?

A. No, there was a period in there some time during the latter part of 1939 that there were some 200-odd shares, I don't know the exact amount, off-hand, that were owned by N. Gibbons.

Q. I asked you about the number of shares you owned just prior to January the 1st, 1939.

A. I thought I answered that approximately 1,100 shares—wait a minute, I am wrong, pardon me—approximately 2,300 shares.

(Testimony of Raymond Lewis.)

Q. And prior to that you had hold of all but two shares, is that correct? A. That is correct.

Q. Did the California Century Company on the 9th of January, 1939 own two parcels of real property on Vermont [12] Avenue, one at the southeast corner of Second Street and Vermont Avenue, a parcel with a frontage of approximately 150 feet on Vermont, with a depth of approximately 400 feet on Second? A. Yes.

Q. Was that property improved with a dance pavilion known as the Palomar Dance Pavilion?

A. That and another building, yes.

Q. Did they also own a parcel of real property at the northeast corner of Third Street and Vermont Avenue, which adjoins the dance hall property on the south?

A. Not the dance hall property on the south. The dance hall property was on the north of the two parcels.

Q. Well, this parcel was on the south of the dance hall property; is that correct?

A. Legally it was two parcels of land instead of one parcel, adjoining the parcel where the dance hall pavilion was.

Q. Yes. And the latter parcel was used as a parking lot, was it?

A. As a parking lot and cocktail lounge and a storage building, and there is an entrance to the dance hall.

Q. Was the size of that second parcel which we

(Testimony of Raymond Lewis.)

have referred to as a parking lot parcel, or the parcel on the corner of Third and Vermont, approximately 265 feet on Vermont Avenue, by a depth of 250 feet on Third for a distance [13] of 165 feet on Vermont, and then for the northerly 100 feet of that parcel did it extend back for a depth of approximately 400 feet?

A. Your description is a little vague. The property actually was an L-shaped piece of property with the long part of the L paralleling the dance hall property.

Mr. Hart: I have a map here.

Q. Is this rough drawing approximately a description of the two parcels, the one outlined in red being the parking lot parcel and the property above being the property covered by the dance pavilion?

A. The one in red is the one you referred to as the parking lot parcel, but the parking lot also had a couple of buildings on it.

Q. Yes. A. That is correct.

Q. The frontage of the parking lot parcel then was 255 feet on Vermont Avenue, 250 feet deep on Third Street, and then for the north 100 feet of that parcel it extended from a depth ranging from 394.66 to 406.37 feet? A. Yes.

The Court: Will you mark that as an exhibit?

Mr. Hart: Yes, we offer it as Plaintiff's Exhibit 1.

The Court: Plaintiff's Exhibit 1 in evidence.

Q. By Mr. Hart: What were the improvements on the parcel we have referred to as the parking lot property? [14]

(Testimony of Raymond Lewis.)

A. There were three improvements, one on the northeast corner of the lot—it had a building approximately 100 by 100, a concrete building; on the northerly edge of the parcel it had a brick building approximately 30 feet wide and approximately 300 feet long, with an electric sign extending on the roof of the building practically the entire length, and the auto park was paved and landscaped.

Q. Did the California Century Company own any other asset at that time? That is January 9th, 1939.

A. Well, I have the date of the transfer of the other assets it had and the bill of sale for the other property.

Q. Well, I will put it this way—did the California Century Company transfer all of its assets except the parcel of real property we have referred to as the parking lot parcel to the Amusement Enterprises, Incorporated? A. When?

Q. I am asking you if they did at any time during the year 1939 transfer all of their assets except the parcel of real property designated as the parking lot parcel.

A. I haven't got the dates fresh in my mind, but they did transfer, for stock in the Amusement Enterprises, all of their assets except this so-called parking lot parcel, with the buildings on it.

Q. What did the California Century Corporation receive in exchange for that transfer?

(Testimony of Raymond Lewis.)

A. That stock in the Amusement Enterprises.
[15]

Q. How many shares?

A. Two hundred and sixty some-odd thousand shares the way I recall it.

Q. That was the same number of shares set forth in the permit issued by the Corporation Commissioner authorizing the transfer?

A. I don't know about that permit; I don't recall it; but I imagine it was the same number.

Q. That transfer was carried out pursuant to a permit you obtained from the Corporation Commissioner, was it? A. Yes.

The Court: How many shares of stock?

The Witness: I haven't got the exact number; approximately two hundred and sixty-odd thousand shares.

Q. By Mr. Hart: After that transaction the assets of the California Century Company then consisted of a block of stock in the Amusement Enterprises of approximately two hundred and sixty some odd thousand shares, and the parking lot parcel?

A. And the lease to the Amusement Enterprises on the parking lot property.

Q. And approximately when did this transaction take place?

A. The transfer—we have the papers on it. I would have to check those papers and find out the exact date.

Q. Did the California Century Company thereafter [16] transfer to you a block of stock in the Amusement Enterprises, Incorporated?

(Testimony of Raymond Lewis.)

A. That is correct.

Q. And approximately how long after the other transfer did that transfer take place?

A. That again—I have a record of it over there on the table.

Q. Well, it was within a few days?

A. Well, I am guessing, Mr. Hart. I can give you the exact date if you want to go into it.

Q. By the Court: Will you mark on this Plaintiff's Exhibit 1 the parking lot?

A. Yes, sir, I can shade it in, your Honor.

Q. What is the other that is not shaded in? What does the blue pencil part of it you have represent?

A. That is the parcel retained by the California Century Company and leased to the Amusement Enterprises.

Q. And what does the red part indicate?

A. That was the part sold to the Amusement Enterprises for stock in that corporation.

Q. The parking lot is in blue? A. Yes.

The Court: You may proceed.

The Witness: The parcel that was sold to the Amusement Enterprises, the bill of sale was made out on January the 12th, 1939. [17]

Q. By Mr. Hart: Is this the bill of sale—is this your signature? A. That is correct.

Mr. Hart: I would like to introduce this bill of sale in evidence.

The Court: Are you talking about a bill of sale to real property?

(Testimony of Raymond Lewis.)

Mr. Hart: No, this is the personal part of the transaction.

The Court: All right, Plaintiff's Exhibit 2.

PLAINTIFF'S EXHIBIT No. 2

BILL OF SALE

Corporation

Know All Men By These Presents, That

California Century Company, a Corporation duly organized and existing under and by virtue of the laws of the State of California, the party of the first part, and Amusement Enterprises, Inc., a Corporation duly organized and existing under and by virtue of the laws of the State of California, the party of the second part.

Witnesseth: That the party of the first part, for and inconsideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, to it in hand paid by the party of the second part, the receipt wheerof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, all the hereinafter described personal property situated in and upon those certain premises known as "The Palomar", located at 3440 West Second Street, Los Angeles, California:

Furniture and Furnishings

Kitchen and Dining Room Equipment

(Testimony of Raymond Lewis.)

Dishes, Silverware and Glassware

Electrical and Mechanical Equipment

Office Appliances

Sundry Maintenance Equipment

Leasehold Improvements

(Reference is hereby made to the Appraisal Report of the Fidelity Appraisal Co., dated August 1, 1938, for a full and more detailed description of the aforementioned personal property, which said appraisal is incorporated herein by reference and made a part hereof as though herein set forth in full.)

To Have and To Hold, the same to the said party of the second part, its successors and assigns forever. And said first party does for itself, its successors and assigns, covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the title to the said property, goods and chattels hereby conveyed, against the just and lawful claims and demands of all persons whomsoever.

Witness the seal of the Corporation and our signatures on its behalf as its duly authorized officers this 12 day of January, 1939.

[Seal]

CALIFORNIA CENTURY
COMPANY

By RAYMOND LEWIS

Its President

By FRANK TIMPSON

Its Secretary

(Testimony of Raymond Lewis.)

State of California

County of Los Angeles—ss.

On this 12th day of January, A. D., 1939, before me, F. E. Dent, a Notary Public in and for the said County and State, personally appeared Raymond Lewis, known to me to be the President, and Frank Timpson, known to me to be the Secretary of the California Century Company, the corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] F. E. DENT,

Notary Public in and for said County and State.

CERTIFICATE OF SECRETARY OF CALIFORNIA CENTURY COMPANY AS TO AUTHORIZATION OF CONVEYANCE OF CORPORATE ASSETS.

The undersigned, Frank Timpson, hereby certifies:

1. That he is and has been at all times herein mentioned the duly elected and acting Secretary of California Century Company, a California corporation.

(Testimony of Raymond Lewis.)

2. That at a special meeting of the Board of Directors of said corporation duly held on November 7, 1938, at 3440 West Second Street, Los Angeles, California, the following resolutions were duly adopted:

“Whereas, the Board of Directors of this corporation deems it to be for the best interests of this corporation and its shareholders that certain of its property and assets be conveyed, transferred and assigned, in accordance with Schedule ‘C’ hereto attached and made a part hereof, to Amusement Enterprises, Inc., a California corporation, in consideration for the issuance by said Amusement Enterprises, Inc. to this corporation of Two Hundred Ninety-one Thousand Seven Hundred (291,700) shares of the capital stock of said Amusement Enterprises, Inc., which shares are of the par value of One Dollar (\$1.00) each, in accordance with the above described plan of reorganization:

Now, Therefore, Be It Resolved that the above described offer of Amusement Enterprises, Inc. be, and the same is, hereby accepted and Raymond Lewis, President, is hereby authorized and directed to notify said Amusement Enterprises, Inc. of such acceptance; and

Be It Further Resolved that Raymond Lewis, President, and Frank Timpson, Secretary of this corporation, be, and they hereby are, authorized and directed to execute and deliver for and on behalf of this corporation and in its

(Testimony of Raymond Lewis.)

name such deeds, bills, or bills of sale, and/or assignments, and any other instruments and/or documents necessary or advisable in connection therewith conveying, transferring and assigning to Amusement Enterprises, Inc., a California corporation, certain of the properties and assets of this corporation described in the aforesaid Schedule 'C' simultaneously with the issuance and delivery to this corporation of the aforesaid Two Hundred Ninety-one Thousand Seven Hundred (291,700) shares of the capital stock of the said Amusement Enterprises, Inc.; and

Resolved Further, that in accordance with Section 343 of the California Civil Code, the officers of this corporation be, and they hereby are, authorized and directed to take such steps as they may deem necessary or proper to procure the approval of the principal terms of the transaction and the nature and amount of the consideration by the vote or written consent of the shareholders of this corporation entitled to exercise a majority of the voting power on the proposal to convey, transfer and assign certain of the property and assets of this corporation, as aforesaid; and

Resolved Further, that this corporation acquire from its earned surplus One Thousand One Hundred Twenty (1,120) shares of its outstanding Ten Dollar (\$10.00) par value capital stock from its shareholders in consideration

(Testimony of Raymond Lewis.)

for Two Hundred Ninety-one Thousand Seven Hundred (291,700) shares of the One Dollar (\$1.00) par value stock of Amusement Enterprises, Inc.; and

Resolved Further, that the aforesaid Two Hundred Ninety-one Thousand Seven Hundred (291,700) shares of One Dollar (\$1.00) par value capital stock of Amusement Enterprises, Inc. be delivered to the shareholders of this corporation entitled thereto upon delivery to this corporation of the aforesaid One Thousand One Hundred Twenty (1,120) shares of its Ten Dollar (\$10.00) par value capital stock, as aforesaid; and

Resolved Further, that the earned surplus of this corporation be reduced on its books and records by the sum of Twenty Thousand Seven Hundred Fifty-nine Dollars and Eighty-eight Cents (\$20,759.88); and

Resolved Further, that the aforesaid One Thousand One Hundred Twenty (1,120) shares of the outstanding Ten Dollar (\$10.00) par value stock of this corporation be carried as treasury shares, when, as and if the same shall be received by this corporation, as aforesaid."

3. That the foregoing resolutions of the Board of Directors of said corporation have been duly approved by the written consent of the shareholders of said corporation entitled to exercise a majority of the voting power on such proposal, which consent

(Testimony of Raymond Lewis.)

has been evidenced by the execution and filing with the undersigned, as Secretary of said corporation, of written consents in the form hereto attached as Exhibit "A" and made a part hereof, by shareholders holding of record Two Thousand Five Hundred (2,500) shares of said corporation entitled to exercise voting power on such proposal.

4. That Two Thousand Five Hundred (2,500) is the total number of issued and outstanding shares of said corporation entitled to exercise voting power on such proposal.

In Witness Whereof, the undersigned has executed this certificate and impressed hereon the seal of said corporation this 7th day of November, 1938.

[Seal]

FRANK TIMPSON

Secretary of California Century
Company.

SCHEDULE C

Amusement Enterprises, Inc., Transferee

SCHEDULE OF ASSETS ACQUIRED

As of October 15, 1938 from California Century Company, Transferor	
Land	
Parcel Number One of Appraisal Report by Fidelity Appraisal Co., dated August 1, 1938.....	\$ 97,600.00
Buildings	
Located on Parcel Number One Described Under Land Account	255,104.80
Building Appurtenances	
Located on Parcels Number One and Number Two of Appraisal Report by Fidelity Appraisal Co., dated August 1, 1938	74,087.05
	<hr/>
	\$426,791.85

(Testimony of Raymond Lewis.)

Less: Liens and Encumbrances

First Deed of Trust, Securing Note

Payable to Security First National

Bank of Los Angeles.....\$46,244.03

Accrued Interest 578.05 \$46,822.08

Second Deed of Trust, Securing Note

Payable to R. M. Johnson.....\$12,661.49

Accrued Interest 53.45 12,714.94

Real Property Taxes, Payable Under

Ten-year Plan\$ 1,571.59

Accrued Interest 23.57 1,595.16

Real Property Taxes for 1938-9 Fiscal
Year:

Los Angeles County Taxes on Parcel
Number One of Appraised Report
by Fidelity Appraisal Co.,
dated August 1, 1938.....\$ 3,289.92

Deduct Unconsumed Portion..... 2,385.19 904.73 \$ 62,036.91

\$364,754.94

Other

Contained In and Upon the Premises Known as
Parcels Number One, Two and Three of Appraisal
Report by Fidelity Appraisal Co.,
dated August 1, 1938 and Summarized as
Follows:

Furniture and Furnishings..... \$28,447.63

Kitchen and Dining Room Equipment..... 7,066.78

Dishes, Silverware and Glassware..... 1,815.12

Electrical and Mechanical Equipment..... 33,345.48

Office Appliances 2,527.93

Sundry Maintenance Equipment..... 404.28

Leasehold Improvements 20,373.25

\$93,980.47

Less Furniture, Fixtures, Equipment, Et Cetera
to be Acquired from Summer Company

51,508.56 \$ 42,471.91

\$407,226.85

(Testimony of Raymond Lewis.)

EXHIBIT "A"

**"WRITTEN CONSENT OF SHAREHOLDERS
TO THE CONVEYANCE OF CERTAIN OF
THE PROPERTY AND ASSETS OF CALI-
FORNIA CENTURY COMPANY.**

Whereas, at a special meeting of the Board of Directors of California Century Company, a California corporation, duly held at 3440 West Second Street, in the City of Los Angeles, County of Los Angeles, State of California, on the 7th day of November, 1938, the Board of Directors of said corporation authorized the conveyance of certain of its property and assets to Amusement Enterprises, Inc., a California corporation, on the following terms and for the following consideration:

California Century Company, a California corporation, will convey, transfer and assign all its right, title, interest and equity in and to all the property and assets of the "The Palomar" business, as set forth in Schedule 'C' hereto attached and made a part hereof, to Amusement Enterprises, Inc., a California corporation, in consideration for Two Hundred Ninety-one Thousand Seven Hundred (291,700) shares of the One Dollar (\$1.00) par value capital stock of said Amusement Enterprises, Inc.

Now, Therefore, each of the undersigned shareholders of California Century Company does hereby approve and consent to the principal terms of the

(Testimony of Raymond Lewis.)

transaction and the nature and amount of the consideration as hereinbefore set forth.

In Witness Whereof, each of the undersigned has hereunto signed his name and following his name the date of signing and the number of shares of said corporation held of record by him on said date entitled to vote on the proposal to make such conveyance of the property and assets of said corporation.

Name	Date	Number of Shares
Raymond Lewis	Nov. 7, 1938	2498
Stanley Mitchell	Nov. 7, 1938	1
Frank Timpson	Nov. 7, 1938	1

[Endorsed]: Plf Exhibit No. 2 Filed 6/3/41

Q. By Mr. Hart: What did the California Century Company receive in exchange for the assignment and transfer to you of the shares of stock in the Amusement Enterprises, Incorporated?

A. Stock in the California Century Company.

Q. And how many shares of stock in the California Century Company did you turn over?

A. Approximately 1,120 shares.

Q. That transfer took place subsequent to the transaction wherein the California Century Company transferred certain assets to the Amusement Enterprises, Incorporated?

A. Well, I don't know the exact date. The transfer of those assets started in—they were consummated in January, 1938. Our records show—the min-

(Testimony of Raymond Lewis.)

utes of our meeting that Mr. Musgrove had, his office copy showed they started in November, 1938 and they were consummated in [18] January, 1938—1939, rather.

Mr. Hart: I move that statement be stricken. He introduced a bill of sale in evidence giving the date of the transfer.

Mr. Musgrove: The date of the bill of sale is as counsel stated, the 12th of January, but Mr. Lewis states the negotiations started prior to that time. Necessarily they must have started prior to that time.

The Court: Yes, that is as I understand it.

Q. By Mr. Hart: Now the transfer of the shares of stock in the Amusement Enterprises, Incorporated, from the California Century Company to you, took place after this transaction, didn't it?

A. You are asking me—I don't know the exact date. I think you have the date in these corporation department records you have on hand here.

Q. You don't know when the transaction took place, the transfer took place?

A. I don't know offhand, but I can refresh my memory. The lady is here with the records, so all we have to do is to look it up.

The Court: Well, let's have the records, wherever there are records, counsel.

Mr. Hart: The records of the Corporation Commissioner's file do not show this transfer. Here is the permit issued by the Corporation Department authorizing the transaction. [19] I would like to

(Testimony of Raymond Lewis.)

introduce that in evidence. We can have a copy substituted.

Mr. Musgrove: What is the date of the permit?

Mr. Hart: January 11, 1939.

The Court: How long is it?

Mr. Hart: Three pages. Will it be satisfactory to counsel to have a copy of this substituted as an exhibit?

Mr. Musgrove: Yes.

The Court: It will be received as Plaintiff's Exhibit 3.

PLAINTIFF'S EXHIBIT No. 3

Before the Department of Investment, Division of
Corporations of the State of California.

File No. 68879LA

Receipt No. LA 3144

“ “ LA 3969

In the matter of the application of

“AMUSEMENT ENTERPRISES, INC.”

for a permit authorizing it to sell and issue its
securities

PERMIT.

This Permit Does Not Constitute a Recommendation
or Endorsement of the Securities Permitted to
be Issued, but is Permissive Only.

This permit is issued upon the following express
conditions:

(Testimony of Raymond Lewis.)

(a) That a true copy of this permit be given to the subscriber prior to the taking of subscriptions.

(b) That unless revoked, suspended, or renewed upon application filed on or before the date of expiration specified in this condition, this permit and all authority to sell and issue securities hereunder, shall terminate and expire on the 10th day of July, 1939.

“Amusement Enterprises, Inc.” is a California corporation incorporated on or about October 17, 1938, with an authorized stock structure consisting of 500,000 shares of the par value of \$1.00 each, all of which shares are of the same class, and none of which as of this date appear to have been issued.

Applicant has its principal office at 3440 West Second Street, Los Angeles, California, and was organized for the purpose of acquiring certain assets including real property and to thereafter engage in the business of operating a ball room and restaurant known as “The Palomar.” In addition, applicant has executed a lease for adjoining property, which lease runs for a term of thirty years commencing November 7, 1938, and calls for a total rental of \$450,000.00, payable in monthly installments of \$1,250.00 each. The leased property is calculated to provide parking facilities for applicant’s patrons.

The financial statements submitted, after giving

(Testimony of Raymond Lewis.)

effect to the issuance of shares authorized in issuance paragraph 1 hereof, and an appraisal filed with this Division, indicate that as of October 15, 1938, under these circumstances, the applicant would have gross tangible assets of \$517,913.74, subject to liabilities of \$125,547.01, and intangible assets of \$32,160.12, with 309,000 shares issued and outstanding.

As further consideration for certain of the assets applicant will acquire, in addition to certain of its shares herein authorized to be issued, applicant proposes to execute an unsecured promissory note in the principal sum of \$26,306.04, payable October 15, 1940. The liabilities hereinabove referred to, include said promissory note.

Funds received from the sale of shares herein authorized to be sold for cash will be used by applicant to reduce current accounts payable.

"Amusement Enterprises, Inc." is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to California Century Company, a California corporation, and Summer Company, a California corporation, or to either of them, an aggregate of not to exceed 309,000 of its shares, as consideration for the business and assets described in the application filed December 21, 1938, first to be assigned, transferred and conveyed to applicant, subject

(Testimony of Raymond Lewis.)

to the assumption by applicant of liabilities not to exceed in the aggregate the sum of \$125,-547.01, together with additional liabilities incurred in the ordinary course of business since October 15, 1938, for the uses and purposes recited in said application and the papers filed in connection therewith.

2. Thereafter and subsequent to the sale and issuance of all the shares authorized to be sold and issued under issuance paragraph 1 hereof, in the manner therein recited, to sell and issue an aggregate of not to exceed 25,000 of its shares, at and for the price of \$1.25 per share, cash, lawful money of the United States, for the uses and purposes recited in its application and the papers filed in connection therewith, subject to an aggregate selling expense of not to exceed 20 per cent of the amount received in cash on account of the selling price, including commissions payable only to duly licensed brokers or agents.

This permit is issued upon the following additional condition:

(c) That all subscriptions for any of the shares authorized by paragraph 2 hereof shall be taken upon subscription blanks of a form to be first submitted to and approved by the Commissioner of Corporations, and that this permit shall be printed in full upon said subscription blanks.

(Testimony of Raymond Lewis.)

Dated: Los Angeles, California

January 11, 1939.

EDWIN M. DAUGHERTY

Commissioner of Corporations

By J. A. HAHN

Deputy.

PMW:FS

[Endorsed]: Plf. Exhibit No. 3. Filed 6/3/41.

Mr. Musgrove: May I suggest, Mr. Clerk, this is a State record and we will have a copy made of it, so we will not be taking the State's records.

The Court: Let's have the date of the permit.

Mr. Hart: January 11, 1939.

The Court: As I understand it this permit authorized the Amusement Enterprises to transfer the shares of stock——

Mr. Hart: Your Honor, the permit authorizes the issuance of 309,000 shares to the Amusement Enterprises, Incorporated, and the Summer Company, and the application designates——

The Court: Just a moment, I want that straight.

Mr. Hart: The permit reads as follows——

The Court: The permit is issued to what corporation?

Mr. Hart: The Amusement Enterprises, and authorizes, as set forth: [20]

“1. To sell and issue to California Century

(Testimony of Raymond Lewis.)

Company, a California corporation, and Summer Company, a California corporation, or to either of them, an aggregate of not to exceed 309,000 of its shares, as consideration for the business and assets described in the application filed December 21, 1938, first to be assigned, transferred and conveyed to applicant, subject to the assumption by applicant of liabilities not to exceed in the aggregate the sum of \$125,547.01, together with additional liabilities incurred in the ordinary course of business since October 15, 1938, for the uses and purposes recited in said application and the papers filed in connection therewith."

Now if we go back to the application, we find—which application I would like also to introduce in evidence—we find the exact number of shares—

Q. Mr. Lewis, is that your signature?

A. Yes.

Mr. Hart: I would like to introduce in evidence also the application for that permit, signed by the Amusement Enterprises, Incorporated, by Raymond Lewis, president, and point out that in the application it is designated that 291,700 shares of the stock should go to the California Century Company—I will read that portion of the application.

"Applicant proposes to issue its said Three Hundred Nine Thousand (309,000) shares to said corporations in the [21] following proportions: California Century Company—Two Hundred Ninety-one Thousand Seven Hundred

(Testimony of Raymond Lewis.)

(291,700) shares; and Summer Company—
—Seventeen Thousand Three Hundred (17,300)
shares.”

The Court: The signature the witness just identified is the signature attached to the application.

Mr. Hart: Yes.

Mr. Musgrove: We will stipulate to that, the signature of the Amusement Enterprises, Incorporated, by Raymond Lewis, president.

The Court: And it is dated when?

Mr. Hart: The application is dated—it is filed December 21, 1938.

The Court: Plaintiff's Exhibit 4. You will file a photostatic copy?

Mr. Hart: Yes, we will file a copy of it in lieu of the original.

Q. Now, after the transactions that you have mentioned, it left the California Century Company with the parking lot as its sole asset?

A. The parking lot parcel, do you mean, Mr. Hart?

Q. Yes. A. Yes.

Q. What was the income of the California Century Company? A. \$1,250 a month. [22]

Q. That was the only income that it had?

A. I don't recall of any other income.

Q. Was that the rental on the lease of the parking lot? A. That is correct.

Q. How many shares of stock in the California Century Company—

(Testimony of Raymond Lewis.)

The Witness: Pardon me, may I interrupt a minute—you said that these transactions took place, this particular lease was signed November 30, 1938.

Q. Well, that is consistent, I believe, with your statement.

A. What do you mean by consistent with my statement?

The Court: Your answer was that the only asset the California Century Company had after the transfer was the lease on the parking lot, which income amounted to \$1,250 a month.

The Witness: Yes.

The Court: Proceed, counsel,—and then the witness added the fact that the lease was dated November 5, 1938.

Q. By Mr. Hart: How many shares of stock in the California Century Company did you have immediately after the transaction with the California Century Company, in which you acquired two hundred and sixty-odd thousand shares of the Amusement Enterprises, Incorporated stock?

A. I haven't got the date down every time in my mind, [23] what date that took place.

Q. Well, after the transaction in which you transferred to the California Century Company 1,190 shares I believe you said of its stock in exchange for stock of the Amusement Enterprises, Incorporated, how many shares did you have? How many shares of the California Century Company?

(Testimony of Raymond Lewis.)

Mr. Musgrove: How many shares of the California Century Company stock he had left, do you mean?

Q. By Mr. Hart: Yes, how many shares did you have left?

A. Approximately 1,100, the way I recall, but I am guessing.

Q. Did you reacquire any of the stock from the California Century Company after that time?

A. Well, the way I recall I reacquired Mr. Givens': he had a couple of hundred shares of that stock before this transfer took place—the stock he held. Now what date that took place I don't recall offhand.

Q. Then you had a total of approximately 1,300 shares of stock in the California Century Company during that period in there?

A. It was between 1,100 and 1,300. When that 200 shares was transferred I don't recall.

Q. You never reacquired the stock that was transferred to the California Century Company?

A. No, no, that has never been reacquired. [24]

Q. Is this your signature?

A. That is correct.

The Court: Showing the witness his signature on what?

Q. By Mr. Hart: I show you your statement of assets and liabilities, filed in the bankruptcy proceeding of Raymond Lewis, doing business as Lewis Construction Company, and ask you whether this

(Testimony of Raymond Lewis.)

is your signature at the bottom of the schedule there.

A. That is my signature.

The Court: What is the date of that?

Mr. Hart: This is April 29, 1940, the schedule of assets.

Q. And you signed this before a notary public?

A. Yes, I suppose you are referring to where I signed that I owned 2,500 shares, and I explained it to Mr. Sampsell, the receiver——

The Court: Just a minute, witness, just answer the question.

A. Yes, I signed it before a notary.

Q. By Mr. Hart: In this statement you show you own 2,500 shares of California Century stock?

A. I made a mistake in putting the figures down. In other words that statement was drawn up in Mr. Granger's office, the attorney, very hurriedly one afternoon when I had none of my records in front of me, and we left out a few items and put in a few items that had been disposed of [25] previously, and it was all explained.

Q. Nevertheless you swore to this signature?

A. My signature is on there, which was sworn to before a notary public, yes.

Mr. Hart: I would like to introduce this schedule in evidence.

Mr. Musgrove: May it be considered in evidence by reference instead of copying the entire record?

The Court: It may be received by reference.

(Testimony of Raymond Lewis.)

PLAINTIFFS' EXHIBIT No. 5

In the United States Circuit Court of Appeals for
the Ninth *District*.

Case No. 10084

CALIFORNIA CENTURY CORPORATION, a
California corporation, RAYMOND LEWIS, do-
ing business as Lewis Construction Company, and
PAUL W. SAMPSELL, Trustee of the Estate of
Raymond Lewis, Debtor, a Bankrupt,
Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a national banking association,
Appellee.

STIPULATION

It Is Hereby Stipulated by and between the ap-
pellant, California Century Corporation and the
appellant, Raymond Lewis, doing business as Lewis
Construction Company, and the appellee, Security-
First National Bank of Los Angeles, a national
banking association, by and through their respec-
tive counsels herein, that in lieu of the entire Ex-
hibit referred to in the transcript of testimony and
proceedings on file herein as plaintiff's Exhibit No.
5, being the schedule of assets and liabilities filed
in bankruptcy proceedings No. 36226-C by appel-
lant, Raymond Lewis, doing business as Lewis Con-

(Testimony of Raymond Lewis.)

struction Company, the transcript on appeal herein shall include only the following portions of said Exhibit, as follows:

SCHEDULE A—STATEMENT OF ALL
DEBTS OF BANKRUPT

Schedule A-3 Creditors Whose Claims are un-
secured

Amusement Enterprises, Inc., 214 South Vermont Avenue, Ap. \$55,000.00. (In the event of a liquidation of the above corporation sums owing by this debtor to it are to be paid out of sums accruing on any stock held by the debtor.)

Oath to Schedule A

State of California,
County of Los Angeles—ss.

I, Raymond Lewis, the person who subscribed to the foregoing schedule do hereby make solemn oath that the schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information and belief.

RAYMOND LEWIS

Petitioner.

Subscribed and sworn to before me this 29th day of April, 1940.

ADELE O. CARVER,

Notary Public in and for the County of Los Angeles, State of California.

(Testimony of Raymond Lewis.)

SCHEDULE B—STATEMENT OF ALL PROPERTY
PERSONAL PROPERTY

Schedule B-2—Negotiable and non-negotiable instruments of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately).

268,132 shares of the capital stock of Amusement Enterprises, Inc.—par value \$1.00 per share	\$536,264.00
2500 shares of the capital stock of Summer Company	No Value
2500 shares of the capital stock of California Century Company	No Value

* * * * *

Oath to Schedule B

State of California,
County of Los Angeles—ss.

I, Raymond Lewis, the person who subscribed to the foregoing schedule hereby make solemn oath that the schedule is a statement of all my property, real and *persona*, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information and belief.

RAYMOND LEWIS

Petitioner.

Subscribed and sworn to before me this 29th day of April, 1940.

ADELE O. CARVER,

Notary Public in and for the County of Los Angeles, State of California.

(Testimony of Raymond Lewis.)

JOS. MUSGROVE

Attorneys for Appellants.

HELGOE and HART

By HOWARD W. HART

Attorneys for Appellee.

[Endorsed]: Filed March 13, 1942. Paul P. O'Brien, Clerk.

Mr. Musgrove: May I refer to that, because it is in No. 36226-C of the United States District Court, Southern Division, District of California, Southern Division, in the matter of Raymond Lewis and so forth, bankruptcy? [26]

Cross Examination

Q. By Mr. Musgrove: Mr. Lewis, at the time of this transaction, was there a lease on this property? A. Yes, there was.

Q. And you have some documents before you?

A. I have the lease here between the Amusement Enterprises and the California Century Company for the lease on the so-called auto park property.

Q. That covers the property described in Plaintiff's Exhibit 1 under the red lines?

A. That is correct.

Q. After the execution of this lease, did the Amusement Enterprises Corporation, or Incorporated, perform the terms of the lease up until October, the time of the fire? A. They did.

(Testimony of Raymond Lewis.)

Q. The Amusement Enterprises had its fire on October 1st or 2, 1939?

A. I think October 1, 1939.

Q. In which their property was destroyed?

A. In which the property was practically totally destroyed on the parcel that is marked blue—pardon me, the parcel marked red. [28]

Q. On Plaintiff's Exhibit 1? A. Yes.

Q. And after this transfer to the Amusement Enterprises, Incorporated, of the property known as the dance hall, what property did the California Century Company have left?

A. They had the property that is marked in blue on Plaintiff's Exhibit 1.

Q. And that consisted of what?

A. That consisted of two buildings, one approximately 300 by 30, and another building approximately 100 by 100, and a paved auto park covering approximately an acre and a half, and a sign on top of these buildings, and whatever fixtures that were attached to the buildings as part of the buildings.

The Court: Could you describe the dimensions of the first lot? A. Approximately 300 by 30.

The Court: The building I mean.

The Witness: Yes, sir.

Q. By Mr. Musgrove: What was that used for?

A. The Vermont front of the long building was used as a cocktail lounge, and farther back it was used as rest rooms, waiting rooms, check rooms, and

(Testimony of Raymond Lewis.)

our ticket seller and the entrance was in that building; and the back building, which was approximately 100 by 100, was used as a storage [29] room and was used as an auxiliary dining room.

Q. When did these negotiations with the Amusement Enterprises, Incorporated, start?

A. Well, the occasion of them——

Q. When?

A. They started in approximately October, 1938, when we made a deal with a brokerage house on Spring Street for the refinancing of our business, and in that deal we formed another corporation, and consolidated, or bought some assets from the California Century Company.

Q. That was when the Amusement Enterprises was formed?

A. Yes, in 1938. The way I recall it, it was approximately October, 1938.

Q. And that took over part of the California Century Company?

A. That took over part of the California Century Company, yes.

Q. In consideration of the stock of this new company?

A. That is correct.

Mr. Musgrove: May we have this lease marked an exhibit for the defendant?

The Court: Defendants' Exhibit A. That is the lease that is dated November 7, 1938, from the California Century Company to the Amusement Enterprises. [30]

ROBERT BAKER,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Q. By the Clerk: What is your name?

A. Robert Baker.

Direct Examination

Q. By Mr. Hart: Mr. Baker, what is your business?

A. I am a real estate broker and appraiser.

Q. How long have you been in that business?

A. 39 years, of which the last 27 years was in Los Angeles.

Q. During your experience as a real estate broker, have you ever appraised business properties in the City of Los Angeles?

A. I have, yes.

Q. Would you name some of the companies for whom you have acted as an appraiser?

Mr. Musgrove: Objected to as incompetent. I will stipulate Mr. Baker is a real estate man.

The Court: You admit his qualifications as an expert?

Mr. Musgrove: Yes.

The Court: Proceed with your questions.

Q. By Mr. Hart: Are you familiar with the property located on the east side of Vermont Avenue between Second and Third Streets in the City of Los Angeles? [31]

A. I am.

Q. Are you familiar with the market prices of similar property in the neighborhood?

(Testimony of Robert Baker.)

A. I am.

Q. From your knowledge of this property, have you formed an opinion as to the fair market value of that parcel we have referred to as the parking lot parcel, being a parcel of land with a frontage of 265 feet on Vermont Avenue, the southerly 165 feet of which has a depth of 250 feet on Third Street and the northerly 100 feet of which has a depth of 394.66 feet to 406.97 feet? A. I have.

The Court: And marked in blue on Plaintiff's Exhibit 1?

A. Yes.

Q. By Mr. Hart: What in your opinion was the reasonable market value or fair market value of that property on the 9th of January, 1939?

Mr. Musgrove: I object to that as incompetent, irrelevant and immaterial on the ground the value of that property on the 9th of January, 1939, is not material to the issues of this case. If it had a great value it would not affect the issues of this case. This is fraud—based on the theory there was a fraud of the creditors and alleges the Security Bank was a creditor to the extent of less than \$1,000, and that they entered into a lease on January 9, 1939. There is no other creditor involved, just a \$1,000 creditor, and also the record now shows that there were certain transactions between [32] the California Century Company and the Amusement Enterprises, Incorporated, whereby certain portions of their prop-

(Testimony of Robert Baker.)

erty were transferred. Also the record shows certain properties were retained by the California Century Company. Also the record shows the California Century Company retained a lease in which there was a payment of \$1,250 per month for the use of a parking lot. The issues in this case involve \$1,000. As to the value of that property at that time I cannot see how it could aid the court or how it is material or competent to the issues involved in this action. And I therefore object to it.

(Argument.)

Mr. Hart: Your Honor, I will develop facts later on which show clearly, if counsel wishes me to, that this property was covered by claims and debts, which makes it very material what the value of the property was. This witness is out of order at this time, your Honor.

The Court: At this time I will overrule the objection.

A. In my opinion the market value of that property at that time, January 9, 1939, was \$74,500.

Q. By Mr. Hart: Is your opinion based on the fair market value of that property free from encumbrances? A. Yes, sir.

Q. And if there were bond assessments or encumbrances against the property, you would reduce the appraisal accordingly. Is that correct? [33]

A. Yes.

Mr. Hart: That is all.

(Testimony of Robert Baker.)

Cross Examination [34]

Q. Now for a similar piece of property on the southeast corner the value would be just the same, wouldn't it?

A. The value would be the same, but you could purchase it for considerably less.

Q. You could purchase it cheaper?

A. Yes.

Q. But you still had the same value for the same size piece of property. Is that true? A. Yes.

Q. By the Court: You started to say something about filled-in ground.

A. The southeast corner probably has more filled-in ground than the northeast corner has.

Q. By Mr. Musgrove: Mr. Baker, did you consider this property was zoned when you appraised it last Saturday?

A. It was zoned for business, yes, sir.

Q. You considered it zoned for business?

A. Yes, sir.

Q. Did you consider it zoned for any other purpose?

A. In a general way I know it has been zoned for amusements. [38]

Q. What is that?

A. I say it has been zoned for amusements.

Q. Did you consider that in the value or appraisal you made?

(Testimony of Robert Baker.)

A. Naturally. I took everything into consideration.

Q. What did you consider—did it detract from its value, the fact that it was zoned for amusements, or increase its value?

A. It increased its value.

Q. How much? A. Oh, that is hard to say.

Q. How much did you figure in your appraisal?

A. Well——

Q. Don't you know?

A. Probably about 20 per cent more.

Q. Well, what did you figure? You didn't give it a thought, did you?

A. Yes, I did give it some thought.

Q. What did you figure?

A. Naturally I haven't told you, Mr. Musgrove, that I appraised it for more money because I took into consideration they had a dance hall there and it could be used for a parking lot while the southeast corner couldn't. Naturally that would make the northeast corner more valuable than the southeast.

Q. Don't you know, Mr. Baker, from your experience, [39] that the fact that it was zoned for amusement enterprises, that it did increase the value materially?

A. I wouldn't say materially. It increased the value.

Q. For amusement purposes? A. Yes.

Q. And that is true of that entire block, of which the Palomar was a part?

A. That is true.

REGINALD J. CROMIE,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Q. By the Clerk: What is your name?

A. Reginald J. Cromie.

Direct Examination

Q. By Mr. Hart: Mr. Cromie, what is your official position?

A. Deputy County tax collector.

Q. Pursuant to subpoena issued by this court, have you produced a record showing the status of taxes against the property described in Plaintiff's Exhibit 1, and marked with a blue pencil, being the property at the northeast corner of Vermont and Third shown on this plat? A. Yes, I have.

Q. Would you state to the court whether the taxes for the years 1938 and 1939 were paid when due?

Mr. Musgrove: Objected to as incompetent, irrelevant and immaterial.

Q. By Mr. Hart: I will ask this question. When was the second installment of taxes for the fiscal years 1938-1939, due?

A. They were due January 20, 1939.

Q. Was the tax assessment against this property for the second installment in 1938-1939 paid when due? [43]

Mr. Musgrove: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Reginald J. Cromie.)

The Court: That is on the same ground as the other objection?

Mr. Musgrove: Yes.

The Court: Objection overruled.

A. No, they were not.

Mr. Musgrove: May I amplify that—this is January 20, 1939, which is subsequent, if the court please, to the transaction involed.

The Court: Yes, I understand.

Q. By Mr. Hart: Was that tax assessment paid at any time prior to the delinquency date, April 20, 1939? A. No, it was not.

Q. Will you give us the amount of the taxes?

A. For the second installment, the one that went delinquent, the total amount of those was \$1,544.79.

Q. By the Court: Now that item of \$1,544.79 applied to what period of taxation?

A. That was from January 1, 1939, to June 30, 1939.

Q. And you call that the second installment?

A. Yes, our fiscal year is from July 1st to June 30th, and the second installment becomes due in January and takes up to June 30th of the same year.

The Court: That is all. [44]

Cross Examination

Q. By Mr. Musgrove: That second installment became due on the 20th day of January, 1939?

A. That is correct.

Q. And the taxes were a lien on the property?

(Testimony of Reginald J. Cromie.)

A. They were.

Q. And the property secured the payment thereof? A. That is correct.

Mr. Musgrove: That is all. [45]

RAYMOND LEWIS

recalled.

Direct Examination

Q. By Mr. Hart: Mr. Lewis, referring to the parcel of real property which we mentioned as the parking lot parcel, the parcel marked in blue, was that property covered by a trust deed to the Bank of America? A. That is correct.

Q. And what was the amount of the loan due to the Bank of America? A. When?

Q. On the 9th of January, 1939.

A. I don't recall the amount. [46]

The Court: Is there such a difference, Mr. Hart, that you will want to get the exact figure?

Mr. Hart: Yes.

The Court: Is the point you want to urge that the income was not sufficient to pay the taxes and interest and the bond issue obligations as they became due?

Mr. Hart: That is right, I want to show the obligations were such that I am satisfied the company didn't have the income to pay those obligations as they came due.

(Testimony of Raymond Lewis.)

The Court: Have you any information about that, Mr. Lewis?

The Witness: Yes, I get his point. I was just trying to go through in my own mind the facts about it.

The Court: Just take your time about it.

The Witness: I know at the time when that point came up we discussed the point of the income, the amount of income necessary, and I know we were satisfied at that time that we had sufficient income to take care of those things, because it would have been just as easy for us to make a lease—or rather it was within my power to make a lease for 13 or \$1,400, or whatever was necessary to cover it. But I can't recall offhand what the expenses were.

Q. By the Court: How do you account for the fact that the taxes became delinquent and were not paid and went to penalty? [49]

A. I don't recall that. I have had that occur before in other lines of business, and we paid them up. It might have been an oversight, or quite a few things might have happened.

Q. You say it was within your power to set the figures on this lease. Do you mean you had control of both corporations?

A. No, I don't mean that. I mean if it was necessary to get a higher rent I could have influenced the other people that were involved, or I, rather, could have refused to rent it for \$1,250 a month, if it wasn't sufficient.

The Court: Is that all, gentlemen?

Mr. Hart: That is all. [50]

JAMES W. HOWARD,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Q. By the Clerk: What is your name?

A. James W. Howard.

Direct Examination

Q. By Mr. Hart: What is your official position, Mr. Howard?

A. Supervisor of the street bonds department of the City Treasury.

Q. Pursuant to subpoena out of this court have you produced the records of your office showing the opening and widening street bonds for improvement of Third Street, against the property located at the northeast corner of Third Street and Vermont Avenue, which would be the property set forth in Plaintiff's Exhibit 1 referred to as the parking lot parcel, and marked in blue pencil? A. Yes.

Q. Would you state to the court the unpaid principal balance of bonds against that property on the 9th of January, 1939?

A. Of all bonds?

Q. Well, all bonds for the opening and widening of Third Street will be sufficient.

A. Your question again? [51]

Q. What was the unpaid principal balance of the bonds against that property on or about the 9th of January, 1939?

A. I will have to figure that.

(Testimony of James W. Howard.)

Q. I just want the principal balance.

A. I will still have to figure it—\$14,181.30.

Q. That covers all the opening and widening bonds?

A. That is the opening bonds we are speaking about now—that is Bond 791.

Q. Was there any other bond, opening and widening bond? A. Against which?

Q. Against the southern portion of Lot 8 set forth in this plat? A. And lot 9?

Q. And this portion of Lot 9 (indicating).

A. Yes, there is another bond that covers a portion of Lot 9.

Q. Do you have to turn to another page to get that? A. Yes.

Q. Well, will you—I will ask you this—what were the installments delinquent, if any, on that bond issue, in January, 1939?

A. In January, 1939 there was one payment of principal \$709.07 that was delinquent from July 1, 1938.

Q. Was there also interest on that?

A. Interest of \$1,042.32.

Q. Then the total delinquency was—— [52]

A. \$1,751.39.

Q. Was the installment on that bond that became due January 1, 1939 paid when due?

A. No, that wasn't paid till September 14, 1939.

Q. Do you know who paid it at that time?

A. The only way I can tell you that would be

(Testimony of James W. Howard.)

to get further records from the City Treasurer's office.

Q. All right, will you go to the other bond? What was the unpaid principal balance on that bond in January, 1939? A. \$3,890.95.

Q. Were there any delinquencies on that bond at that time, any delinquent installments?

A. That is as of January, 1939. Is that right?

A. That is right.

A. The bond had been delinquent—that being a 10-year bond, it matured July 1, 1938, and as of January, 1939 it was delinquent on the principal payment from July 1, 1934, and the interest payment from July 1, 1937.

Q. Could you tell us approximately what the delinquencies amounted to in January, 1939, without too much computation? A. \$4,054.31.

Mr. Hart: That is all. [53]

Cross Examination

Q. By Mr. Musgrove: That includes the principal and interest that was due—that is the total?

A. Yes.

Mr. Musgrove: That is all. [54]

WARREN V. GLASS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Q. By the Clerk: What is your name?

A. Warren V. Glass.

(Testimony of Warren V. Glass.)

Direct Examination

Q. By Mr. Hart: What is your occupation?

A. I am assistant cashier of the Bank of America.

Q. And pursuant to subpoena, do you have with you a note executed by the California Century Company to the Bank of America?

A. I have.

Q. And is this note secured by a deed of trust on the property on the northeast corner of Third and Vermont?

A. Yes.

Q. I would like to ask you what were the installments on this note?

A. \$750 a month, plus interest beginning April 1st.

Q. Was the installment on the note due January 1, 1939 paid when due?

A. January 1, 1939 was paid January 24, 1939.

Q. Was the installment due February 1, 1939 paid when due?

A. That was paid February 25, 1939.

Q. What about the installment due March 1, 1939? [55]

Mr. Musgrove: I object to that as incompetent, irrelevant and immaterial as to any future payments subsequent to January. How is it material, Mr. Hart?

Mr. Hart: To show whether the company was rendered insolvent. I would like to introduce this in evidence. Do you have any objection?

Mr. Musgrove: I stipulated to it.

(Testimony of Warren V. Glass.)

Mr. Hart: It is dated October 30, 1938 and the principal amount is \$116,420.73.

Q. What was the unpaid principal balance on that note in January, 1939?

A. What day in January?

Q. Give us the date of January 1st, and then the date of February 1st.

A. Of January 1st the balance was \$110,427.73.

Q. Then on February 1, 1939 what was it?

A. \$108,920.73.

Mr. Hart: Do you have any objection to introducing a copy of this in lieu of the original note?

Mr. Musgrove: No, I have no objection.

The Court: It is so ordered. Plaintiff's Exhibit 6.

PLAINTIFF'S EXHIBIT No. 6

Loan Transferred from S. F. Hdqts. 916

California Century Company

3440 W. 2nd St., L. A.

Corporation Instalment Real Estate Note

(Principal Payable in Installments—

Interest Separately)

\$116,420.73

Los Angeles, California, October 6, 1938

For value received, California Century Company, a corporation promises to pay in lawful money of the United States of America, to the order of the Bank of America (National Trust and Savings Association) at its Los Angeles Main Branch in this city the principal sum of One Hundred Sixteen Thousand

(Testimony of Warren V. Glass.)

Four Hundred Twenty and 73/100 Dollars, with interest payable monthly in like lawful money from April 1, 1938 on deferred balances until paid at the rate of five per cent per annum; and said principal sum payable as follows: Seven Hundred Fifty and no/100 Dollars, (\$750.00), on the first day of April 1938, and seven hundred fifty and no/100 Dollars, (\$750.00), on the first day of each and every month thereafter until the 15th day of September, 1947, on which said date the entire balance of principal and interest then unpaid shall become due and payable.

If the interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or instalment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

A Deed of Trust of even date secures the indebtedness evidenced by this note.

In witness whereof, the said Corporation has caused this note to be executed by its officers thereunto duly authorized and directed by a resolution of its Board of Directors duly passed and adopted by a majority of said Board at a meeting thereof duly called, noticed, and held.

CALIFORNIA CENTURY COMPANY
a Corporation

By JOSEPH MUSGROVE

President

By FRANK TIMPSON

Secretary

(Testimony of Warren V. Glass.)

		Interest Paid		Paid on Account of Principal			
		Date	Amount	Paid to	Date	Amount	Balance
				4-1-38	4-14-38	750	115,670.73
Pmts. trans- ferred from old notes 1-17-39	{	5- 9-38	483.32	5-1-38	5- 9-38	750	114,920.73
		6-13-38	479.67	6-1-38	6-13-38	750	114,170.73
		7-16-38	476.96	7-1-38		750	113,420.73
		8-20-38	474.15	8-1-38		750	112,670.73
		9-20-38	471.44	9-1-38		750	111,920.73
		10-18-38	468.31	10-1-38		750	111,170.73
		11-23-38	464.98	11-1-38		750	110,420.73
		1- 6-39	462.38	12-1-38		750	109,670.73
		1-24-39	460.09	1-1-39		750	108,920.73
		2-25-39	456.75	2-1-39		750	108,170.73
		5-12-39	453.21	3-1-39		750	107,420.73
		5-12-39	3.54	a/c			
		5-31-39	447.17	4-1-39		750	106,670.73
		6-26-39	450.77	5-1-39		750	105,920.73
		7-22-39	325.	a/c	8-19-39	296.09	105,624.64
		7-29-39	123.63	6-1-39			
		7-29-39	201.37	a/c			
		8- 7-39	242.57	7-1-39			
		8- 7-39	82.43	a/c			
		8-14-39	325.	a/c			
		8-19-39	28.91	a/c			
		9- 1-39	5.	8-1-39			
		9- 1-39	320.	a/c			
		9- 8-39	297.16	9-1-39	9- 8-39	27.84	105,596.80
					9-14-39	325. *	105,271.80
					9-25-39†	325 †	105,596.80

*N S F written in margin in red ink.

†Indicates red figures.

For Value Received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof, and all taxes and insurance premiums and any other sums that may become due and payable under and by virtue of the provisions of the

(Testimony of Warren V. Glass.)

Deed of Trust (or Mortgage) securing the afore-said note, and I hereby waive presentation, demand, protest, notice of protest and notice of non-payment.

[Endorsed]: Plf. Exhibit No. 6. Filed 6/3/41.

Q. By Mr. Hart: Do your records show the amount you sold this property to the California Century Company for?

A. No, these records are a renewal of the original papers.

Q. Did you subsequently foreclose the trust deed? [56] A. Yes.

Q. When was that?

Mr. Musgrove: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Hart: That is all.

Cross Examination

Q. By Mr. Musgrove: Mr. Glass, I notice you credit payments of \$750 a month; was also the interest credited?

A. Yes, the interest is in this column (indicating). The payments were made right straight across.

Q. This note of October 6, 1938 is a renewal note of some prior obligation?

A. Yes, it was a renewal of a note dated the

(Testimony of Warren V. Glass.)

same date, October 6, 1938—no, wait a minute—no, September 1, 1937, a renewal of that one.

Q. And you don't remember the amount of that?

A. That was the same amount \$116,420.73.

Mr. Musgrove: That is all.

Redirect Examination

Q. By Mr. Hart: Do your records show the payments on that old note, the note you held before in lieu of this one?

A. Yes, our liability card shows that.

Q. What were the payments on that note; what were the [57] payments called for by the note?

A. The payments called for on the original note——

Mr. Musgrove: Do you mean the note of 1937?

Mr. Hart: Yes, the note of which this was a renewal, the previous note.

Mr. Musgrove: Objected to as incompetent, irrelevant and immaterial.

Mr. Hart: I think I can show the company was insolvent even before.

Mr. Musgrove: We have only one insolvency in issue here.

The Court: Let him answer.

Q. By Mr. Hart: What were the payments on the old note?

Mr. Musgrove: Did your Honor rule on the objection?

The Court: Overruled. Let him answer.

A. \$10,000, or more, on the 1st day of March,

(Testimony of Warren V. Glass.)

1938; \$6,500 or more on or before June 15, 1938; \$7,000 or more on or before March 15, 1939; and \$7,000 or more on the 15th day of each and every month until September 15, 1947.

Q. By Mr. Hart: Those were the installments due on the principal? A. Yes.

Q. Were any of those payments made?

A. No. [58]

RAYMOND LEWIS,

recalled as a witness on behalf of the defendant, testified further as follows:

Direct Examination

Q. By Mr. Musgrove: Mr. Lewis, I think on your examination this morning you described this particular property shown by Plaintiff's Exhibit A, or Exhibit 1; now that part shown upon Plaintiff's Exhibit 1 in red was known as what? Did it have a name?

A. It had a dance hall on it and restaurant.

Q. It was known as the Palomar Dance Hall?

A. That is correct.

Q. And about how much of that portion marked blue was the portion of the dance hall?

A. Oh, an area I would say—

Q. About how wide, Mr. Lewis?

A. Well, 30 by 300 approximately.

(Testimony of Raymond Lewis.)

Q. It went along the whole length of the dance hall?

A. Yes, and then another building approximately 100 by 100.

Q. Now in November, 1938, did the Amusement Enterprises and the California Century Company enter into an agreement as to the purchase and sale of certain of their property? A. They did.

Q. And that agreement covered what property? [62]

A. That covered the property marked in red on Plaintiff's Exhibit 1, and they entered into an agreement for the lease of the part of the property marked in blue.

Q. Now did you have an appraisement of that property made, Mr. Lewis?

A. Yes, we had an appraisal made at that time.

Q. I show you a book. Will you explain what that is?

A. We hired an outside appraisal company to make an appraisal of the building and the real estate and the equipment.

Q. Upon what date was that appraisal made?

A. August 1, 1938.

Q. And how did the value of the property compare on the 9th day of January, 1939 with the value of August, 1938?

A. There would be no change in the value.

Mr. Hart: If you are testifying to what the appraiser stated—is that what you are testifying?

(Testimony of Raymond Lewis.)

The Witness: I am testifying to my own knowledge right now, that there was no change in the valuation.

Q. By Mr. Musgrove: Who employed these appraisers? A. The Summer Company.

Q. The Summer Company was the operating company?

A. The Summer Company was the operating company of the business known as the Palomar Dance Hall.

Q. And the California Century Company held the fee title to the property?

A. That is correct. [63]

Q. And you were also president of the Summer Company? A. That is correct.

Q. And do you know what the value of that portion of the property marked in blue on Plaintiff's Exhibit 1 was on the 9th day of January, 1939?

A. My own estimation of the value?

Q. Yes, as president of the California Century Company? A. Yes, I do.

Mr. Hart: I want to object to the question on the ground that it calls for the conclusion of the witness. The witness has not been qualified as an expert, and the witness was not the owner of the property.

(Argument on the objection.)

The Court: I have serious doubts about it, but we will permit the question to be answered.

(Testimony of Raymond Lewis.)

Mr. Hart: May we note an exception?

The Court: Answer the question.

A. I estimate the value at \$175,000.

Q. By Mr. Musgrove: That was the fair market value.

A. I considered it a fair value.

Q. Now, Mr. Lewis, what gives that property its value, in addition to ordinary real estate in that neighborhood.

A. If you can let me elaborate on that a little, I will base it on what has happened—I mean our experience over the last seven or eight years in that neighborhood, and also [64] over Los Angeles. They are now really putting a sport center up on that particular property—they are financing it I should say, and have already started construction on the back of the property. It is impossible in Los Angeles, to start with, to obtain a large piece of property with area enough that is already zoned for amusements, centrally located, with auto park available. In trying to obtain land in the vicinity of this particular block of land, we found out that none of it is zoned for amusements. The piece owned by the Pacific Electric between Fourth and Sixth Streets is not only not zoned for amusements, but has all restrictions on it for single purpose dwellings, and we have appeared before the Planning Commission and found that they will not change the zoning for amusement purposes. Therefore, we consider that this particular piece of

(Testimony of Raymond Lewis.)

property, regardless of what other pieces in the neighborhood were valued at, had a particular value in itself by reason of its zoning for amusements and the size of it.

Q. Is the entire block between Second and Third, and Vermont and the next street east, included in that amusement zone?

A. That is correct, that square block, and the property east of it and south of it are not zoned for amusements, and we made application before the Planning Commission and had several hearings and we couldn't get a change, and that application has been made in the last two years. [65]

Q. The property south of it is owned by the Pacific Electric Railway Company?

A. That is correct.

Q. Is that filled land?

A. There is a portion of it that is filled, but the fills are very shallow.

Q. At that time, Mr. Lewis, in January, or within a month or so one way or the other, did you have any plans for developing this property?

A. We had two plans—when I say “we” I mean both as the California Century Company and acting for the Amusement Enterprises—we intended, and when I say “we” I mean the California Century Company in this case—to sell it to the Amusement Enterprises, who in turn were arranging for finances for putting up an additional building for ice skating.

(Testimony of Raymond Lewis.)

The Court: I doubt that testimony has anything to do with the issues in the case.

Q. By Mr. Musgrove: Did you have any offers at that time, Mr. Lewis, to sell the property?

A. We were intending to sell it to the Amusement Enterprises.

Q. At what price?

A. In excess of \$150,000, approximately \$160,000, I think was the price we talked about.

Q. Did the fire that you had at the Palomar affect the [66] value of these properties?

A. Very materially, although I might add, Mr. Musgrove, that since the fire a group of us have formed a new company——

Mr. Hart: I object to that as irrelevant.

The Court: Objection sustained.

Q. By Mr. Musgrove: What in your opinion, Mr. Lewis, would the fact that this property was zoned for amusements or amusement enterprises have, would it increase or decrease the value?

Mr. Hart: Is it understood my objection goes to this testimony?

The Court: Yes, it is so understood.

A. If it was to be used for amusement purposes it would materially increase the value.

Q. By Mr. Musgrove: To what extent, Mr. Lewis?

A. The best way I can answer that is that we could buy real estate in that neighborhood for 50 per cent of the value of this particular piece. And

(Testimony of Raymond Lewis.)

when I say 50 per cent of the value, I mean 50 per cent of the value the Bank of America has set on the property in the last year, and for which we paid \$15,000 on a new option.

Mr. Hart: I move that be stricken.

The Court: It may go out.

Q. By Mr. Musgrove: At the time of the transfer of the property to the Amusement Enterprises, did the California Century Company retain any assets? [67]

A. Yes, it owned this parcel of ground with the buildings on it that is marked blue.

Q. And that is of the value you have stated?

A. That is correct.

[Endorsed]: Filed Jan. 26, 1942. [68]

[Endorsed]: No. 10084. United States Circuit Court of Appeals for the Ninth Circuit. California Century Company, a California Corporation, and Raymond Lewis, doing business as Lewis Construction Company, Appellants, vs. Security-First National Bank of Los Angeles, a national banking association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 13, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth District

Case No. 10084

CALIFORNIA CENTURY CORPORATION, a
California corporation, RAYMOND LEWIS,
doing business as Lewis Construction Com-
pany,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a national banking association,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD FOR THE
CONSIDERATION THEREOF.

Appellant's Points on Appeal Shall Be:

1. The United States District Court had no juris-
diction over the subject matter or parties in said
action;

2. Subsequent to January 11, 1940 when the
California Century Company acquired its own
shares for its share in the Amusement Enterprises,
Inc., said California Century Company owned one
valuable piece of real estate and there was no evi-
dence produced at the trial from which it could
be adduced that said real estate was not of greater
value than the debts of the California Century
Company;

3. The transfer of shares of the Amusement Enterprises, Inc., to Raymond Lewis in exchange for shares of the California Century Company subsequent to January 11, 1939, by said California Century Company was done pursuant to the terms of a contract between said parties entered into on the 7th day of November, 1938, and before the appellee herein became a creditor of the California Century Company.

Appellant designates the following parts of the record which he thinks necessary for the consideration of the above points, to be included in the record on appeal:

1. Complaint;
2. Answer of California Century Company;
3. Answer of Raymond Lewis, doing business as Lewis Construction Company;
4. Memorandum of Opinion;
5. Findings of Fact and Conclusions of Law;
6. Judgment;
7. Notice of Appeal;
8. Plaintiff's Exhibit 2. (Bill of sale and Resolution);
9. Reporter's Transcript
 - page 12 line 17 to page 24 line 26;
 - page 28 line 4 to page 30 line 24;
 - page 32 line 15 to page 34 line 2;
 - page 38 line 6 to page 40 line 8;
 - page 43 line 21 to page 44 line 15;
 - page 62 line 22 to page 68 line 4.

Dated: March 10, 1942.

JOSEPH MUSGROVE,
THOMAS H. CANNAN
ROBERT M. MILLER

By JOS. MUSGROVE

Attorneys for Appellants.

Received copy of the within Statement of Points and Designation of Parts of Record for the Consideration Thereof, this 11th day of March, 1942.

HELGOE & HART

FH

Attorneys for Appellee.

[Endorsed]: Filed Mar. 13, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE, SECURITY-
FIRST NATIONAL BANK OF LOS AN-
GELES, OF ADDITIONAL PARTS OF THE
RECORD TO BE PRINTED IN TRAN-
SCRIPT

Appellee, Security-First National Bank of Los Angeles, a national banking association, hereby designates the following additional exhibits and additional portions of the reporter's transcript to be included in the record on appeal herein.

Said record shall include the following additional exhibits:

(1) Plaintiff's Exhibit No. 3 being a copy of the permit issued by the Corporation Commissioner,

State of California, dated January 11, 1939.

(2) Plaintiff's Exhibit No. 5 being the stipulated portions of schedules of assets and liabilities filed in the bankruptcy proceedings in the matter of the Estate of Raymond Lewis, doing business as Lewis Construction Company, debtor, Case No. 36226-C.

(3) Plaintiff's Exhibit No. 6 being a copy of a note in favor of Bank of America executed by California Century Corporation, dated October 30, 1938.

The record on appeal herein shall include also the following additional portions of the reporter's transcript:

Page 10 line 15 to page 12 line 17, both inclusive.

Page 24 line 26 to page 26 line 13, both inclusive.

Page 31 line 1 to page 32 line 15, both inclusive.

Page 43 line 1 to page 43 line 21, both inclusive.

Page 44 line 15 to page 45 line 9, both inclusive.

Page 46 line 4 to page 46 line 13, both inclusive.

Page 49 line 5 to page 54 line 5, both inclusive.

Page 55 line 1 to page 58 line 24, both inclusive.

Dated: March 19th, 1942.

HELGOE AND HART

By HOWARD W. HART

Attorney for Appellee, Security-
First National Bank of Los
Angeles, a national banking
association.

(AFFIDAVIT OF SERVICE BY MAIL
1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

Thelma Farrell, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: Suite 715, 639 South Spring Street, Los Angeles, California that on the 19th day of March, 1942, affiant served the within Designation by appellee, Security First National Bank of Los Angeles, of Additional Parts of the Record to Be Printed in Transcript on the Appellants in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Appellants at the residence/office address of said attorney, as follows:

“Joseph Musgrove, Esq.,
720 Bartlett Building,
Robert M. Miller, Esq. and
Thos. A. Cannan, Esq.
215 West Seventh Street,
Los Angeles, California”;

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

THELMA FARRELL

Subscribed and sworn to before me this 19th day of March, 1942.

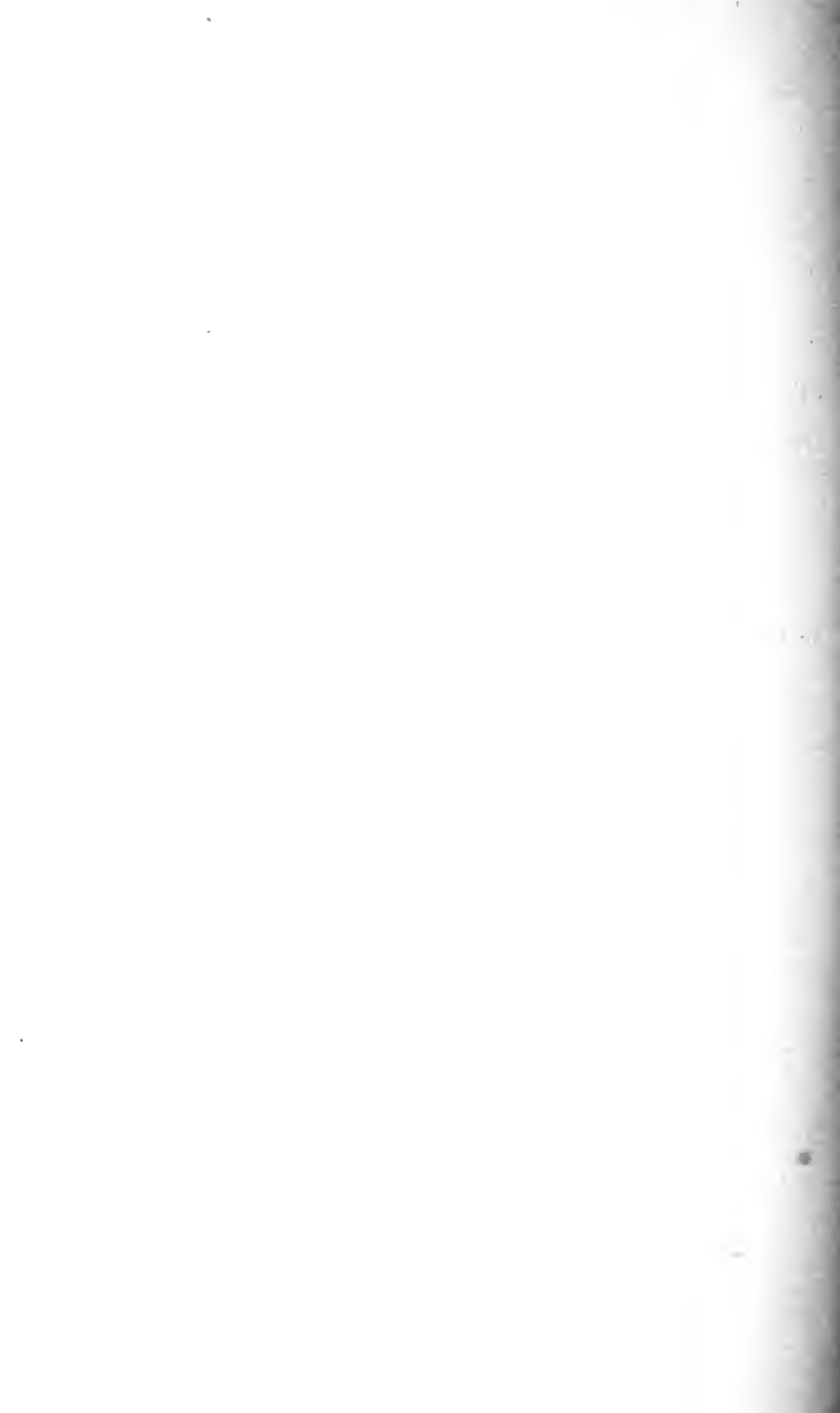
(Seal)

HOWARD W. HART

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 25, 1943.

[Endorsed]: Filed March 19, 1942. Paul P. O'Brien, Clerk.



No. 10084

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA CENTURY COMPANY, a California Corpora-
tion, and RAYMOND LEWIS, doing business as Lewis
Construction Company,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a
national banking association,

Appellee.

APPELLANTS' OPENING BRIEF.

FILED

MAY 14 1942

AUL P. O'BRIEN,
CLERK

JOSEPH MUSGROVE,
THOMAS H. CANNAN,
ROBERT M. MILLER,

215 West Seventh Street, Los Angeles,
Attorneys for Appellants.



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No. 10084

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CENTURY COMPANY, a California Corporation,
and RAYMOND LEWIS, doing business as Lewis
Construction Company,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a
national banking association,

Appellee.

APPELLANTS' OPENING BRIEF.

**Statement of Pleadings and Facts Discloses Basis
Upon Which It Is Contended That District
Court Had No Jurisdiction and That the Above
Entitled Court Has Jurisdiction on Appeal.**

It is contended by appellant that the above entitled court has jurisdiction of this appeal by virtue of Section 128 (a) and (d) of the Judicial Code (28 U. S. C. Section 225).

The applicable part of said section is set forth as follows:

(a) *Review of Final Decisions.* The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions—

First. In the district court, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title. . . .

(d) *Circuits in which review shall be had.* The review under this section shall be in the following circuit courts of appeals: The decisions of a district court of the United States within a State in the circuit court of appeals for the circuit embracing such State; . . .

Appellant contends that the district court had no jurisdiction to try this case and that the pleadings disclose no basis from which it can be contended that said district court had such jurisdiction. The action was tried and judgment was entered [Tr. of Rec. p. 25] and appellant served and filed notice of appeal [Tr. of Rec. p. 27] within the time prescribed by law.

Statement of Case.

Appellee recovered a judgment against the California Century Corporation on or about the 20th day of March, 1940 in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California and thereafter said California Century Corporation transferred and assigned to appellant Raymond Lewis, doing business as Lewis Construction Company, shares of capital stock of the Amusement Enterprises, Inc. Subsequently and on the 20th day of April, 1940, appellant Raymond Lewis, doing business as Lewis Construction Company was adjudicated a bankrupt in the District Court of the United States, Southern District of California, Central Division, case number 36226C, Paul W. Sampsell was appointed receiver therein and the before mentioned shares of capital stock of the Amusement Enterprises, Inc., were delivered to said receiver.

Appellee alleged that the transfer of said shares from California Century Corporation to appellant was made without a valuable consideration while said corporation was insolvent, to hinder, delay and defraud existing creditors, to wit, appellee, of said corporation.

POINT I.

The United States District Court Had No Jurisdiction Over the Subject Matter or Parties in Said Action.

Section 23 (a) of the Bankruptcy Act provides as follows:

“Sec. 23. *Jurisdiction of United States and State Courts*—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.”

The Act in itself excludes the United States District Courts of jurisdiction in actions of this nature in all cases except where said court would have had jurisdiction in an action between the parties had there been no bankruptcy proceedings. Appellee's complaint does not set forth any grounds upon which said court would be justified in taking jurisdiction over this matter.

At the time this action was filed, the bankruptcy court had in its possession the shares of stock of the Amusement Enterprises, Inc., the subject matter of this action. Said court had exclusive jurisdiction to determine adverse claims to said shares of stock.

Appellant makes two contentions here. First, that it is the duty of the bankruptcy court to determine and adjudicate adverse claims to property in its possession, and second, where in some instances the court sitting in

bankruptcy may give its permission for an action to be tried elsewhere, it must be tried in a state court unless the United States District Court would have had jurisdiction in an action between the parties had there been no bankruptcy.

In Volume 2 on page 552 of Collier on Bankruptcy, 14 Ed., states as follows:

“Legal or equitable actions against a receiver or trustee may be divided into three classes: (1) . . . ; (2) . . . ; and (3) suits against the receiver or trustee regarding the property of the bankrupt estate.

“. . . Actions in class (3) may be brought outside of the bankruptcy court only when that court consents thereto, and if brought in a district court sitting at law or in equity, would be governed by section 23 just as suits brought by the receiver or trustee, heretofore discussed.”

And in footnote 7a on page 548 it is stated:

“In the unusual case where a bankruptcy court would consent to a suit against the receiver or trustee in a federal district court at law or in equity regarding the bankrupt estate, the district court’s jurisdiction would be governed by section 23a, whereas section 23b clearly applies only to suits by the receiver or trustee.”

The case of *Schumacker v. Beeler*, 293 U. S. 367, 79 L. Ed. 443 holds as follows:

“In enacting section 23 it was clearly the intent of the Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions

of section 2 of the Act of 1867. The purpose was to leave such controversies to be heard and determined for the most part in the state courts 'to the greater economy and convenience of litigants and witnesses' . . . The Congress by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction."

Goodnaugh Mercantile & Stock Co. v. Galloway, 156 Fed. 504, holds:

"Thus the law leaves the parties to litigate as to those matters falling within the purview of the section in the courts that have jurisdiction, notwithstanding the adoption of the bankruptcy act."

In re Cohen et al., 107 Fed. (2d) 881, is an action commenced in the United States District Court by a claimant to property in possession of the trustee in bankruptcy. The court held:

"It is elementary that title to all property of a bankrupt vests in his trustee upon the adjudication and the bankruptcy court has jurisdiction to decide all adverse claims to the property, in the custody of the trustee, regardless of whether it is real estate situated in another district."

Thomson v. Magnolia Petroleum Co., 309 U. S. 478, 84 L. Ed. 876 holds:

"Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession.

"A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession."

Gross v. Irving Trust Company, 289 U. S. 342, 77 L. Ed. 1243, holds:

“Upon an adjudication of bankruptcy title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The Bankruptcy Court has exclusive jurisdiction, and that court’s possession and control of the estate cannot be affected by the proceedings in other courts, state or federal. (Citing cases.) Such a jurisdiction having attached, control of the administration of the estate cannot be surrendered, even by the court itself.”

In re Antigo Screen & Door Co., 123 Fed. 249

“We take it that any court, either one in equity, common law, admiralty or bankruptcy, having in its treasury a fund to which there is a dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident to every court * * *. The fund so possessed is in *custodia legis* and right to it may only be asserted and determined in the court which possesses it.”

Remington on Bankruptcy, Volume 5, page 518, Section 2352 provides:

“And all actions in regard to property in its custody must be taken (unless, perhaps, in some cases, the bankruptcy court permits otherwise) in the bankruptcy court.”

Remington on Bankruptcy, Volume 5, page 301, provides:

“It is not Clause (a) of Section 23 of the Bankruptcy Act, 11 U. S. C. A. Section 46, that enlarges the jurisdiction of the United States District (formerly the Circuit) Courts in bankruptcy litigations.

“So far as that Clause of Section 23 is concerned, they would only have jurisdiction over suits brought by trustees in bankruptcy, in case of diversity of citizenship, or some other jurisdictional fact existing, which in the usual procedure would have conferred jurisdiction on the District (formerly the Circuit) Court of the United States in case the bankrupt had sued; nor would they have jurisdiction in such cases unless the amount involved exceeded \$3,000.00, formerly \$2,000.00; but ‘consent’ to confer jurisdiction upon the District (formerly Circuit) Court in bankruptcy matters even where diversity of citizenship, etc., does not exist.”

Remington on Bankruptcy, Volume 5, page 569, Section 2369 provides:

“In general, neither a State Court, nor the United States District Court has jurisdiction, even by express permission of the Bankruptcy Court, to maintain an action the object of which is to determine the validity or extent of a claim against the bankrupt estate that is in process of administration in the bankruptcy court, or to determine priorities in the distribution of the assets of the bankrupt estate in such custody; for the jurisdiction of the Bankruptcy Court over the administration of the bankrupt estate is original and exclusive; and the Bankruptcy Court has no authority to designate that jurisdiction to another court.”

U. S. Fidelity & Guarantee Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055, holds:

“We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all proceedings in the bankruptcy court is intended to be exclusive of all other courts, and that such proceedings include, among

others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the rights of the estate to money, and its distribution, the determination of the provisions and priorities to be accorded to claims presented for allowance and payments in regular course, and the supervision and control of the trustees and others who are employed to assist them.

“Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration or to confide them to another tribunal.”

Remington on Bankruptcy, Volume 5, page 306, Section 2182 provides:

“Therefore, as a rule, the state court would not be the one to which the trustee would be relegated were it not for still further exceptions found in Section 23 (b) and in Section 70e, (11 U. S. C. A. Section 46, 110, later discussed). Thus, ever since the amendments of 1903, 1910 and 1926 the state court has been a proper forum before the first of these amendments conferring plenary jurisdiction in certain cases on the bankruptcy courts, the state courts alone possessed such jurisdiction in certain cases on the bankruptcy courts, the state courts alone possessed such jurisdiction except where diversity of citizenship conferred jurisdiction on the federal (now district) courts.

“The state court is not debarred from jurisdiction over suits against adverse claimants by any of the provisions of the Act.”

See:

City of Long Beach v. Metcalf, 103 Fed. (2d) 483.

POINT II.

The Court Erred in Finding That California Century Corporation Rendered Itself Insolvent by Virtue of Its Transfer of Shares of the Amusement Enterprises, Inc., to Appellant.

It is conceded that subsequent to January 11, 1939 the California Century Corporation transferred all of its assets to appellant except that certain real property with improvements thereon referred to as the "parking lot" [Findings XII and XIII of Tr. of Rec. pp. 21 and 22], however, appellee completely failed to produce any evidence from which the court could determine the value of said "parking lot" at the time said transfer was made.

Appellant cannot understand how the court could decide that the California Century Corporation rendered itself insolvent by the above mentioned transfers when it is conceded that said California Century Corporation retained the "parking lot" and appellee introduced no evidence whatsoever as to the value of said "parking lot" at the time the transfer was consummated.

Mr. Robert Baker, a real estate agent and appraiser qualified as an expert and was asked by appellee on direct examination the value of the "parking lot" on January 9, 1939, a wholly immaterial date. The question was objected to on proper grounds, however, the court overruled the objection and Mr. Baker was allowed to testify [Tr. of Rec. p. 64]:

"Q. By Mr. Hart: What in your opinion was the reasonable market value or fair market value of that property on the 9th of January, 1939?

Mr. Musgrove: I object to that as incompetent, irrelevant and immaterial on the ground that the value of that property on the 9th of January, 1939 is not material to the issues of this case. * * *."

Appellee did not attempt to introduce any evidence, which it could have done, of the value of said property subsequent to January 11, 1939 when the transfer took place and in the absence of any evidence thereof, it must be presumed that such evidence would have been unfavorable to said appellee. The court erred in allowing Mr. Baker to testify over proper objection as to the value of the "parking lot" on January 9, 1939 and therefore such evidence should not be considered. An exception to the court's ruling allowing such testimony is not necessary. *Rules of Civil Procedure of the District Courts of the United States*, Rule 46. There is no presumption that the value of property remains the same, particularly when the property is used in a highly speculative business such as that of an amusement center. *Estate of Delancy*, 37 Cal. 176.

Conclusion.

Appellant contends that it is the duty of a referee in bankruptcy to hear all disputes concerning property in his possession. This duty is probably nondelegable. There have been some instances in which the referee in bankruptcy has permitted actions to be filed against the trustee in bankruptcy in other courts and when the referee has such right, the action must be brought in a proper court. The United States District Court is given a very limited jurisdiction over such matters by Section 23a of the Bankruptcy Act and if the matter does not fall within

such section said District Court has no jurisdiction whatsoever over the subject matter of the action. In this case it can be readily determined from the pleadings and the facts that the action could not have been maintained in the United States District Court between the parties had there been no bankruptcy proceedings and therefore said Section 23a of the Bankruptcy Act expressly excludes this action from being tried by said District Court.

The court determined herein that the California Century Corporation rendered itself insolvent at the time it transferred its shares of stock in the Amusement Enterprises, Inc., to appellant, Lewis, in spite of the fact that said court found that the California Century Corporation still had assets, referred to as the "parking lot". There is no competent evidence in the record that said "parking lot" was of less value than the liabilities of said California Century Corporation, in fact there was no evidence whatsoever introduced at the trial as to the value of the "parking lot" subsequent to January 11, 1939, the date of the transfer. It was appellee's duty as plaintiff to prove that the California Century Corporation was insolvent at the time of the transfer and appellee wholly failed in this respect.

For the above reasons, appellant asks that the judgment be reversed and that appellant be reimbursed for his costs of suit herein expended.

Respectfully submitted,

JOSEPH MUSGROVE,
THOMAS H. CANNAN,
ROBERT M. MILLER,

Attorneys for Appellant.

No. 10084

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CENTURY COMPANY, a California Corporation, and RAYMOND LEWIS, doing business as Lewis Construction Company,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Appellee.

APPEAL BRIEF OF APPELLEE SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

HELGOE AND HART,

By HOWARD W. HART,

715 Stock Exchange Building, Los Angeles,

Attorneys for Appellee, Security-First National Bank of Los Angeles.

FILED

JUN 12 1949



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vs.

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national banking association,

Appellee.

**APPEAL BRIEF OF APPELLEE SECURITY-
FIRST NATIONAL BANK OF LOS ANGELES.**

Appellants contend that it is the duty of the Bankruptcy Court to determine and adjudicate adverse claims to property in its possession, and also that where the Bankruptcy Court gives its permission for the trial of an action elsewhere, the action must be tried in a State Court unless the United States District Court would have had jurisdiction in an action between the parties had there been no bankruptcy. We submit that it was the

Bankruptcy Court which tried this case. As alleged in the complaint [Clk. Tr. p. 19] the petition for adjudication in bankruptcy of the defendant, Raymond Lewis, doing business as Lewis Construction Company, was filed in the District Court of the United States, Southern District of California, Central Division, and defendant Paul W. Sampsell had possession of the certificates of stock constituting the subject matter of this suit as receiver in said proceedings. After consent of the Referee in Bankruptcy had been obtained [Court's Transcript p. 7], this suit was instituted in the same court. It was brought, therefore, in the court which was in possession of the certificates of stock constituting the subject matter of the controversy. It was brought in the District Court of the United States, Southern District of California, Central Division, which was the Bankruptcy Court. It is appellee's contention that as the *res* was in the possession of that court, it therefore had exclusive jurisdiction to hear and determine this cause. To such cases, the provisions of Section 23a of the Bankruptcy Act are not applicable.

POINT I.

Where a Court of Competent Jurisdiction Has Taken Property Into Its Possession, the Property Is Thereby Withdrawn From the Jurisdiction of All Other Courts.

In the case of *Wabash Railroad v. Adelbert College*, 208 U. S. 38 on page 46, the Supreme Court stated:

“It appears from this statement that the railroad property affected by this controversy was in the actual possession, through receivers, of Circuit Courts of the United States from the date of the appointment of receivers, May 27, 1884, to the date of their discharge and the delivery of the property to the purchasing committee, which was ordered on June 18, 1889, and accomplished about July 1, 1889. It cannot be and apparently is not disputed that, during that period, the property was in the possession of the Circuit Courts of the United States, and that that possession carried with it the exclusive jurisdiction to determine all judicial questions concerning the property.”

On page 54 the court stated:

“When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it.

For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and are not peculiar to the relations of the courts of the United States to the courts of the States;”

In the case of *Irving Trust Co. v. Fleming*, reported in October, 1934, in 73 Federal Reporter (2d) 423, the Circuit Court of Appeals, Fourth Circuit, stated on page 427:

“Since, therefore, the District Court for the Southern District of New York, through its trustee in bankruptcy, was in possession of the property in controversy, we think that that court alone had jurisdiction to determine rights in and claims against that property, and that no other court had any right to interfere with its possession. As said by Mr. Justice Brandies, speaking for the Supreme Court of the United States in the recent case of *Ex parte Baldwin*, 291 U. S. 610, 54 S. Ct. 551, 553, 78 L. Ed. 1020: ‘The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts.

Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 24 S. Ct. 399, 48 L. Ed. 629; compare *Riehle v. Margolies*, 279 U. S. 218, 223, 49 S. Ct. 310, 73 L. Ed. 669; *Straton v. New*, 283 U. S. 319, 51 S. Ct. 465, 75 L. Ed. 1060. . . .”

In the case of *Gross v. Irving Trust Company*, 289 U. S. 342, 77 L. Ed. 1243, on page 344, the Supreme Court states:

“In *Buck v. Colbath*, 3 Wall. 334, 341, the rule is stated to be that ‘whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being: and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or superior jurisdiction in the premises.’”

In view of the fact that the bankruptcy proceedings were pending in the same court which tried this case, appellant’s argument that it was the duty of the Bankruptcy Court to determine and adjudicate the adverse claim to the property in its possession, must be limited to the question of whether the controversy should have been heard in a summary proceeding rather than with formal pleadings.

POINT II.

Where the Bankruptcy Court Has the Necessary Possession of the Property in Controversy, the Fact That an Adverse Claimant Chooses With the Consent of the Referee in Bankruptcy to Seek Determination of the Rights of the Parties in a Formal, Plenary Manner in That Court, Rather Than by Summary Procedure, Will Not Defeat the Court's Jurisdiction.

In the case of *Whitney v. Wenman*, 198 U. S. 539, the sole question was one of jurisdiction, raised when a demurrer to the bill had been sustained in the District Court on the ground that the court had no jurisdiction. On page 553 the court stated:

“Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure.

.

“ . . . The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien or ownership thereof. . . . Whether the rights of the claimants to the property could be litigated by summary proceedings, we need not determine. What we hold is that under the allegations of this bill the District Court had the right in a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine their rights, and to grant full relief in the premises if the allegations of the bill shall be sustained. This view renders it unnecessary to consider the effect of the amendments of the bank-

ruptcy act, passed February 5, 1903, broadening the power of the bankruptcy courts to entertain suits by trustees to set aside certain conveyances made by the bankrupt."

In the case of *First Savings Bank & Trust Co. of Albuquerque, N. M., et al. v. Butter*, 282 Federal 866, the Circuit Court of Appeals, Eighth Circuit, stated on page 868:

"True, as all of those holding provable demands scheduled by the bankrupt against his estate in bankruptcy, whether preferential or general in their nature, by operation of law became parties to the bankruptcy proceeding, the trustee on his appointment and qualification could have moved in the bankruptcy proceeding for the relief granted him in this suit, and such course would have been much less cumbersome, expensive, and dilatory than the course adopted.

"However, this goes, not to the merits of the case, but merely to the manner in which the relief demanded should be invoked. There is no question of that comity arising between courts of concurrent jurisdiction in this case. Nor is the question of jurisdiction dependent upon the citizenship of the parties. Under the Constitution the jurisdiction of a court of bankruptcy in administering the estates of bankrupts under the provisions of the Bankruptcy Act is complete and exclusive, and it is not only the right, but the duty, of such courts to draw unto themselves all the property of the bankrupt estate and the determination of all claims and demands existing against the same, to the end that there may be an orderly and complete determination and settlement of the entire estate among creditors."

In the case of *Rockmore v. New Jersey Fidelity and Plate Glass Ins. Co. et al.*, 65 Federal Reports (2d) 341, the Circuit Court of Appeals, Second Circuit, stated on page 342:

“A bankruptcy court may adjudicate conflicting rights to property in the actual or constructive possession of the trustee, either in a summary proceeding or in a suit brought in the United States District Court. While such conflicting rights are ordinarily adjudicated in the bankruptcy proceeding itself, the form of the remedy is not important.”

Of the authorities cited by the appellants, the case of *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, is the only one which appears to support his contention. We wish to point out that in that case the District Court (which was the Bankruptcy Court) entered an order giving leave to file the bill in the Circuit Court. It was not the Bankruptcy Court, therefore, which heard and determined that controversy. But in the case presented on this appeal, it was the Bankruptcy Court which heard and determined the controversy.

Appellants' second point is that the court erred in finding that California Century Company rendered itself insolvent by virtue of its transfer of shares of the Amusement Enterprises, Inc., to Raymond Lewis. They argue that the expert witness, Robert Baker, testified as to the value of the real property owned by the defendant, California Century Company, as of the 9th day of January, 1939 and that the value should have been proved as of

the 11th day of January, 1939 or some date subsequent thereto. As there was no evidence that the property was of a highly speculative nature, this contention has no merit especially since the income from the property was limited by a lease. Furthermore, there was ample other evidence, which we shall quote, to support the finding of insolvency. But before quoting this evidence, we wish to point out that as the court found that the transfer was made with the intent to defraud creditors and that the transferee knew at the time that it was made for that purpose, a finding on the insolvency of the transferror is not necessary to support the judgment.

Finding No. XVII, on page 23 of the transcript, reads as follows:

“That the said transfer of said shares of stock in Amusement Enterprises, Inc. to defendant, Raymond Lewis, doing business as Lewis Construction Company, was voluntary and was made for the purpose of defrauding creditors of defendant, California Century Company; that defendant, Raymond Lewis, doing business as Lewis (20) Construction Company, knew the facts pertaining to said transfer, knew at the time of said transfer that defendant, California Century Company, would be rendered insolvent by said transaction, knew that said transfer was being made for the purpose of defrauding creditors of California Century Company.”

POINT III.

Where a Transfer Is Made With Intent to Delay and Defraud Creditors, a Finding That the Transferor Was Insolvent at the Time of the Transfer or Was Rendered Insolvent Thereby, Is Not Necessary to Support a Decree Setting Aside the Transfer as Fraudulent as Against Creditors.

At the time of the transfer Section 3439 of the California Civil Code read as follows:

“Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.”

In *Benson v. Harriman*, 55 Cal. App. 483, 275 Pac. 984, on page 485 of the official reports, the court states:

“Moreover, the rule in this state is that if a conveyance is made with intent to defraud creditors, it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors. *Bekins v. Dieterle*, 5 Cal. App. 690, 91 Pac. 173; *Slade Lumber Co. v. Derby*, 31 Cal. App. 155, 159 Pac. 881; *Johns v. Baender*, 40 Cal. App. 790, 182 Pac. 55; *First National Bank of L. A. v. Maxwell*, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64.”

In *Vogel v. Sheridan*, 4 Cal. App. (2d) 298, 40 Pac. (2d) 946, on page 305 of the official reports, the court stated:

“This action, however, may be sustained under section 3439 of the Civil Code regardless of the ques-

tion of solvency as the evidence was sufficient to show an actual intent to delay and defraud creditors. Such intent invalidates the transaction as against creditors even though the debtor is not entirely stripped of assets and may still have sufficient property after such transfers to satisfy his creditors. *Title Insurance, etc., Co. v. California Dev. Co.*, 171 Cal. 173, 152 P. 542; *First National Bank of L. A. v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; *Alpha H. & S. Co. v. Ruby Mines Co.*, 97 Cal. App. 508, 275 P. 984; *Benson v. Harriman*, 55 Cal. App. 483, 204 P. 255; *Johns v. Baender*, 40 Cal. App. 790, 182 P. 55; *Bekins v. Dietrerick*, 5 Cal. App. 690, 91 P. 173; 12 Cal. Jur. pp. 976, 977. It is only in actions maintained under the proviso in section 3442 that the insolvency of the transferrer becomes of controlling importance, and in such actions, the question of actual intent becomes immaterial."

In the case of *Adams v. Bell*, 5 Cal. (2d) 697 on page 701, the California Supreme Court stated:

"Where an actual intent to defraud is satisfactorily shown, the conveyance may be set aside even though the debtor has not entirely stripped himself of assets. (*Vogel v. Sheridan*, *supra* [182 Pac. 55]; *Benson v. Harriman*, 55 Cal. App. 483 [204 Pac. 255]; *Tobias v. Adams*, 201 Cal. 689, 695 [258 Pac. 588]; *Foss v. Wotton*, *supra*.)"

Although a finding that California Century Company was rendered insolvent by the transfer was not necessary to support the judgment, such a finding was amply supported by the evidence. The evidence proved not only that by the transfer the company's assets were reduced far below its liabilities, but also that the company was not able to pay its debts from its own means as they became due.

POINT IV.

A Debtor Is Insolvent When He Is Unable to Pay His Debts From His Own Means as They Become Due.

Section 3450 of the California Civil Code provides:

“A debtor is insolvent, within the meaning of this title, when he unable to pay his debts from his own means, as they become due.”

In the case of *Alpha H. & S. Co. v. Ruby Mines Co.*, 97 Cal. App. 508, 275 Pac. 984, the court stated, on page 515, official reports:

“The evidence on the part of respondent was that, while the value of the property owned by the company exceeded the amount named in the note and deed of trust, at and prior to the date of the execution of the said note and deed of trust, the company was unable to pay its debts as they became due; that as a matter of fact the note and deed of trust were executed to prevent the creditors of the company, where debts were due and unpaid, from enforcing the collection thereof by attachment. A debtor is insolvent when he is unable to pay his debts from his own means as they become due.”

Southwick v. Moore, 61 Cal. App. 585, 215 P. 704;

First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64.

In *Dixon Lumber Co. v. Peacock*, 217 Cal. 415, 19 Pac. (2d) 233, the California Supreme Court stated:

“A writ of execution returned *nulla bona*, at least in the county of the judgment debtor's residence, makes out a *prima facie* showing of insolvency. We

think it unnecessary to determine whether an execution so returned by the sheriff of a county from which the judgment debtor had lately moved his residence, is sufficient to make out such a case for the reason that there is some independent evidence contained in the letter of Peacock and the efforts of respondent to collect to support the conclusion that the judgment debtor was unable to pay his debts when they became due. It is said in *In re Ramazzina*, 110 Cal. 488 (42 Pac. 970): 'A debtor when he is unable to pay his debts from his own means, as they become due is insolvent.' (*Washburn v. Huntington*, 78 Cal. 573 [21 Pac. 305]; *Sacry v. Lobree*, 84 Cal. 41 [23 Pac. 1088].)"

On page 59 of the clerk's transcript is schedule B of the bankruptcy statement filed by Raymond Lewis, defendant and appellant. In the schedule he listed the 268,132 shares of capital stock of Amusement Enterprises, Inc. which he received in the transfer herein complained of as worth \$536,264.00 and 2500 shares of stock of California Century Company (the entire issue of capital stock of the company) "no value." His signed and sworn statement therefore is virtually an admission that after the California Century Company transferred the stock of Amusement Enterprises, Inc. to himself, the company was insolvent. Its entire issue of stock was valueless.

Turning to page 72 of the transcript we find that this appellant testified as follows:

"Q. Now, after the transactions that you have mentioned, it left the California Century Company with the parking lot as its sole asset? A. The parking lot parcel, do you mean, Mr. Hart?"

Q. Yes. A. Yes.

Q. What was the income of the California Century Company? A. \$1250.00 a month.

Q. That was the only income that it had? A. I don't recall of any other income.

Q. Was that the rental on the lease of the parking lot? A. That is correct."

On page 75 of the transcript, Warrent V. Glass, assistant cashier of the Bank of America, testified as follows:

"Q. And pursuant to subpoena, do you have with you a note executed by the California Century Company to the Bank of America? A. I have.

.

Q. I would like to ask you what were the installments on this note. A. \$750.00 a month, plus interest beginning April 1st."

The note was introduced in evidence and set forth on pages 76 to 78 of the transcript. It reads in part on pages 76 and 77:

"\$116,420.73

Los Angeles, California, October 6, 1938

For value received, California Century Company, a corporation, promises to pay in lawful money of the United States of America, to the order of the Bank of America (National Trust and Savings Association) at its Los Angeles Main Branch in this city the principal sum of One Hundred Sixteen Thousand Four Hundred Twenty and 73/100 Dollars, with interest payable monthly in like lawful money from April 1, 1938 on deferred balances until paid at the rate of five per cent per annum;

and said principal sum payable as follows: Seven Hundred Fifty and no/100 Dollars, (\$750.00), on the first day of April 1938, and seven hundred fifty and no/100 Dollars, (\$750.00), on the first day of each and every month thereafter until the 15th day of September, 1947, on which said date the entire balance of principal and interest then unpaid shall become due and payable.”

The payments on the note are set forth on page 78 of the transcript and show that the payment due January 1, 1939 was \$750.00 principal and \$460.09 interest. The payment due February 1, 1939 was \$750.00 principal and \$456.75 interest. Installments due for many months thereafter are also set forth. These installments of principal and interest were in excess of \$1,200.00 per month.

In addition to the monthly obligation in excess of \$1,200.00 of California Century Company to Bank of America on the note, there were various taxes and bond assessments against the real property owned by the company.

These obligations were as follows:

On page 72 of the transcript James W. Howard, supervisor of the street bonds department of the City Treasury, testified:

“Q. Pursuant to subpoena out of this court have you produced the records of your office showing the opening and widening street bonds for improvement of Third Street, against the property located at the northeast corner of Third Street and Vermont Avenue, which would be the property set forth in Plaintiff’s Exhibit 1 referred to as the parking lot parcel, and marked in blue pencil? A. Yes.

.

Q. Well, will you—I will ask you this—what were the installments delinquent, if any, on that bond issue, in January, 1939? A. In January, 1939 there was one payment of principal \$709.07 that was delinquent from July 1, 1938.

Q. Was there also interest on that? A. Interest of \$1,042.32.

Q. Then the total delinquency was—A. \$1,751.39.

Q. Was the installment on that bond that became due January 1, 1939 paid when due? A. No, that wasn't paid till September 14, 1939.

.

Q. All right, will you go to the other bond? What was the unpaid principal balance on that bond in January, 1939? A. \$3,890.95.

Q. Were there any delinquencies on that bond at that time, any delinquent installments? A. That is as of January, 1939. Is that right?

Q. That is right. A. The bond had been delinquent—that being a 10-year bond, it matured July 1, 1938, and as of January, 1939 it was delinquent on the principal payment from July 1, 1934, and the interest payment from July 1, 1937.

Q. Could you tell us approximately what the delinquencies amounted to in January, 1939, without too much computation? A. \$4,054.31."

On page 68 of the transcript, Reginald J. Cromie, deputy county tax collector, testified:

"Q. Pursuant to subpoena issued by this court, have you produced a record showing the status of taxes against the property described in Plaintiff's

Exhibit 1, and marked with a blue pencil, being the property at the northeast corner of Vermont and Third shown on this plat? A. Yes, I have.

.

Q. Will you give us the amount of the taxes? A. For the second installment, the one that went delinquent, the total amount of those was \$1,544.79.

Q. By the Court: Now that item of \$1,544.79 applied to what period of taxation? A. That was from January 1, 1939, to June 30, 1939.

Q. And you call that the second installment? A. Yes, our fiscal year is from July 1st to June 30th, and the second installment becomes due in January and takes up to June 30th of the same year."

In addition to these obligations there is the unsatisfied judgment of plaintiff against the California Century Company in the sum of \$949.30 alleged in the complaint [Tr. p. 4] and admitted in the answer [Tr. p. 9], Finding No. VII [Tr. p. 20], on which execution had been returned by the marshal "*nulla bona*" [Finding VIII, Tr. p. 20].

From the above evidence it is apparent the debtor California Century Company did not have sufficient income to pay its obligations as they became due, and was therefore insolvent at the time of the fraudulent transfer. Furthermore there is no evidence in the record or referred to in the appellants' brief to support a contention that California Century Company was solvent, or even to overcome the *prima facie* case of insolvency made by Finding No. VIII that execution was returned "*nulla bona*." (*Dixon Lumber Co. v. Peacock*, 217 Cal. 415 (*supra*).)

Conclusion.

As the District Court, Southern District of California, Central Division, had actual possession of the certificates of stock which constitute the subject matter of this suit through its receiver in bankruptcy, that court had exclusive jurisdiction to determine this controversy.

Although there was ample evidence to support the finding of insolvency of the transferror, such a finding was not necessary to support the judgment since the court found also that the transfer was made with intent by both transferror and transferee to defraud creditors.

For the reasons stated, appellee Security-First National Bank of Los Angeles, asks that the judgment of the District Court be sustained and this appellee be reimbursed for its costs herein expended.

Respectfully submitted,

HELGOE AND HART,

By HOWARD W. HART,

*Attorneys for Appellee, Security-First National Bank
of Los Angeles.*

No. 10084.

IN THE

7
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA CENTURY COMPANY, a California corporation,
and RAYMOND LEWIS, doing business as Lewis
Construction Company,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
a national banking association,

Appellee.

APPELLANTS' CLOSING BRIEF.

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APPELLANTS' CLOSING BRIEF.

Point I.

There appears to be no question but that the proposition set forth by appellee in Point I of appellee's brief is a correct statement of the law and that such statement is applicable in this case. The cases therein cited bear out such a contention.

In the case of *Irving Trust Co. v. Fleming*, 73 Fed. Rep. (2d) 423, cited by the appellee, the facts are as follows: The receiver in bankruptcy brought an action

in the United States District Court to recover property, in which action the defendant appeared, thus giving said United States District Court jurisdiction by virtue of section 23b of the Bankruptcy Act. The plaintiff, receiver in bankruptcy, took possession of the property involved. Thereafter a creditor of the defendant commenced an action in the state court of West Virginia and said court seized the property. The question therein involved was whether a receiver in bankruptcy, having possession may be deprived thereof by officers of the state court. The answer obviously being that the United States District Court, once having legal possession had exclusive jurisdiction over said property. It should be pointed out that the United States District Court gained jurisdiction in this action under and by virtue of section 23b of the Bankruptcy Act which permits a receiver to commence an action against an adverse claimant in said court, however, the case should be distinguished from the one on appeal before this court in that this action was against the receiver or trustee in bankruptcy and therefore section 23a is applicable and said section 23a does not provide that the United States District Court may take jurisdiction over the action by the consent of the parties but only when the United States District Court would have had jurisdiction to maintain or to hear the action between the parties had there been no bankruptcy proceedings instituted. It is not contended by appellee that the United States District Court would have had jurisdiction to determine this action had it not been that the defendant Raymond Lewis doing business as Lewis Construction Company was adjudicated a bankrupt.

Point II.

There is some authority sustaining the position set forth as Point II by the appellee but said proposition carefully analyzed does not mean that the United States District Court had jurisdiction to maintain the present action. The first case cited by appellee, *Whitney v. Wenman*, 198 U. S. 539, decided in 1905, was an action by the trustee in bankruptcy commenced in the United States District Court sitting in bankruptcy or in other words, the Bankruptcy Court to recover property allegedly belonging to the bankrupt. It was held in said case that the Bankruptcy Court had jurisdiction under section 2, subdivision 7 of the Bankruptcy Act to maintain said action, the Bankruptcy Court having had constructive possession of said property. In using the term "District Court" in the quotation set forth by appellee the court was referring to the District Court sitting in bankruptcy and the holding therein was merely that the form of the pleadings filed in said District Court sitting in bankruptcy is not important. In said case the court cited *Bardes v. First National Bank*, 178 U. S. 524, 44 L. Ed. 1175, 20 Supreme Court Rep. 1000, which held that section 23b of the Bankruptcy Act prohibits suits commenced by the trustee in the United States District Court in the absence of consent by the defendant or the proposed defendant. The court also cited *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 20 Supreme Court Rep. 1007 which held that when property is seized from the Bankruptcy Court, the United States District Court sitting in bankruptcy had jurisdiction by summary process to compel its return. The court further held that the Bankruptcy Court has jurisdiction over all matters set forth in section 2 of the Bankruptcy Act and that there are certain exceptions provided in said act where the

trustee may maintain an action outside of the Bankruptcy Court and in those instances section 23b of the Bankruptcy Act prevails and "the District Court can, by the proposed defendant's consent, but not otherwise entertain jurisdiction over suits brought by trustees in bankruptcy against third persons" It is only in actions brought by the trustee in bankruptcy that the United States District Court may take jurisdiction by consent of the defendant. In suits against the trustee in bankruptcy section 23a governs and said section does not provide that the United States District Court may take jurisdiction.

The case of *Whitney v. Wenman*, *supra*, definitely does not hold that the United States District Court may maintain an action brought by a trustee in bankruptcy for the sole reason that the Bankruptcy Court had possession of the property involved and in speaking of a plenary action being commenced by the trustee in bankruptcy said case refers to the form of pleadings filed in the Bankruptcy Court.

The case of *Rockmore v. New Jersey Fidelity and Plate Glass Ins. Co., et al.*, 65 Fed. Rep. (2d) 341, and the quotation therefrom set forth by appellee appears on its face to uphold the contention of the appellee. The facts of that case are as follows: The trustee in bankruptcy commenced a plenary action in the United States District Court concerning property neither in actual nor constructive possession of said trustee. The defendants objected to the jurisdiction of the court for the reason that there was no diversity of citizenship between the bankrupt

and the defendants which would confer jurisdiction on the United States District Court in the absence of consent thereto by the defendants. It was held that the trustee in bankruptcy not having possession of the property could neither maintain this action without the consent of the defendants either in the Bankruptcy Court or in the United States District Court. It necessarily follows that the proper place for said action to have been commenced was a state court having jurisdiction over the subject matter of the action. That part of the decision that the Bankruptcy Court may adjudicate conflicting rights to property in the actual or constructive possession of the trustee in a suit brought in the United States District Court was unnecessary to the decision in that the property in this case was neither in the actual nor constructive possession of the trustee. As an authority for such statement which was unnecessary in determining said case the court cited *Central Republic Bank & Trust Co. v. Caldwell*, 58 Fed. (2d) 721, which case held that the Bankruptcy Court always has jurisdiction, summary or plenary over property in the possession of the trustee in bankruptcy and then said case explains the difference between a summary and plenary proceedings. In brief, a summary proceedings is informal and a plenary proceedings is formal, therefore the *Central Republic Bank & Trust Co. v. Caldwell*, *supra*, in holding that the Bankruptcy Court had jurisdiction merely stated that the pleadings which must be filed in the Bankruptcy Court may be either summary or plenary and from that decision the court in *Rockmore v. New Jersey Fidelity & Plate Glass Ins. Co.*, *supra*, decided by dicta that such plenary action may be brought in a court outside of bankruptcy or in other words the United States District Court.

This point is directly decided in the recent case of *Monroe v. Ordway*, 103 Fed. (2d) 813, wherein the court stated:

“But if appellant means that the real estate was owned by and in the possession of the bankruptcy at the time the petition in bankruptcy was filed and at the time of the adjudication, a plenary suit in equity to cancel the sham deed was not the proper remedy; and the court did not err in dismissing the suit. The trustee, under such circumstances, has ample remedy under the Bankruptcy Act, 11 U. S. C. A., Sec. I, *et seq.*, by summary proceedings. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 44 Supreme Court 396, 68 L. Ed. 770.”

Said action was a plenary suit commenced in the United States District Court by the trustee in bankruptcy and was properly dismissed by the United States District Judge.

Kendrick v. Watkins, 121 Fed. (2d) 287, holds as follows:

“Inasmuch as we have concluded that possession was at all times had by the bankrupt, it follows that there was summary jurisdiction to pass upon the instant case. The Referee certainly had summary jurisdiction over the property in the constructive possession of the bankruptcy court and a plenary action was, thus, not necessary. Cf. *Warder v. Brady*, 4 Cir., 1940, 115 Fed. (2d) 89.”

Appellants herein restate the proposition that the court of bankruptcy had exclusive jurisdiction in this case for the reason that the property was in the possession of said court and for the further reason that section 2, subdivision

7, provides that said court is to determine controversies in relation to property of the bankrupt. The only answer that appellee has to this contention is that the United States District Court and the department thereof which heard this case was the court of bankruptcy as provided in the Bankruptcy Act, thus obviating any distinction between said courts. Such a contention is untenable under the cases cited. It is also contrary and repugnant to the provisions of the Bankruptcy Act itself. Section 1 thereof, subdivision 9, provides as follows:

“‘Court’ shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;”

Chapter 2 of the Bankruptcy Act entitled “Courts of Bankruptcy” and section 2 thereof provides as follows:

“CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION . . .

a. The courts of the *United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby* invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . .”

and sections 23 and 24 of the Bankruptcy Act specifically limit and prescribe the jurisdiction over the United States and state courts. To hold that there is no distinction between the United States District Court and the United States District Court sitting in bankruptcy would render

the foregoing sections of the Bankruptcy Act a nullity, because according to appellee's contention the United States District Court as such would have jurisdiction to do anything and everything prescribed in the Bankruptcy Act that a court of bankruptcy could do.

It should further be pointed out that the position the appellee is now taking is being raised here for the first time. The pleadings, findings of fact and judgment filed in the United States District Court indicate that the action was intended as a separate and distinct action against the trustee in bankruptcy. Paragraph III of the complaint [Tr. of Record p. 3] sets forth the bankruptcy proceedings and the case number thereof and in paragraph X of said complaint [Tr. of Record p. 7] the appellee alleged that the referee in the bankruptcy proceedings made "his order permitting plaintiff to institute proceedings in the District Court of the United States, Southern District of California, Central Division . . ." In Finding III of the Findings of Fact and Conclusions of Law [Tr. of Record p. 19] the court found:

"III.

"That on or about April 29, 1940, an involuntary petition in bankruptcy was filed against the defendant, Raymond Lewis, doing business as Lewis Construction Company; *that said bankruptcy proceedings were at all times thereafter and are in the District Court of the United States, Southern District of California, Central Division, case No. 36226-C.*" (Italics ours.)

Besides being contrary to the Bankruptcy Act and inconsistent with the pleadings, findings of fact and the judgment, to interpret the law as appellee contends would

be to upset the established principle that the court having the custody of the property has exclusive jurisdiction over all matters in relation thereto. If the law were as appellee contends it should be, the United States District Court would constantly be interfering and dealing with property in the custody of the Bankruptcy Court. The two courts would have concurrent jurisdiction and both courts could try the same issues, disregarding the other, however, as the Bankruptcy Act now stands the Bankruptcy Court can restrain the United States District Court or any other court from proceeding in matters over which it has taken jurisdiction, which in itself would lead one to conclude that the United States District Court is not the court of bankruptcy as such.

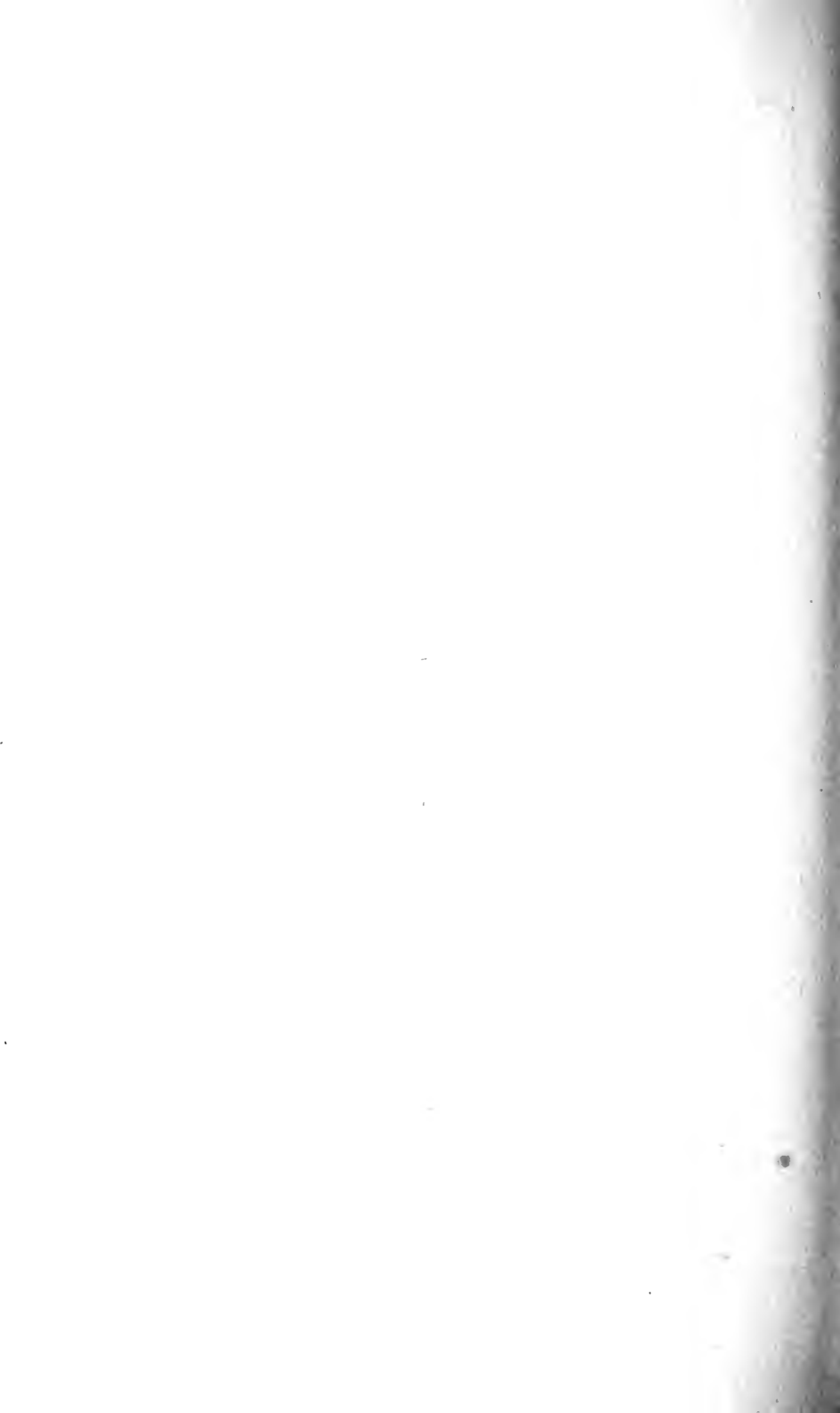
Conclusion.

This was a case which should have been determined in the court of bankruptcy and if for any reason the court of bankruptcy had the power to allow said case to be decided in a court other than the court of bankruptcy then the case must be taken to the court that had jurisdiction over the subject matter of the action. The United States District Court did not have such jurisdiction and such jurisdiction could not be conferred upon said court by the acts and conduct of any of the parties herein.

Respectfully submitted,

JOSEPH MUSGROVE,
THOMAS H. CANNAN,
ROBERT M. MILLER,

Attorneys for Appellants.



NO. 10117

United States
Circuit Court of Appeals

For the Ninth Circuit.

GUSTAVE L. GOLDSTEIN, as Trustee in Bank-
ruptcy of the Estate of Marvin Polakof,
Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

JUL 6 - 1942

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

GUSTAVE L. GOLDSTEIN, as Trustee in Bank-
ruptcy of the Estate of Marvin Polakof,
Appellant,

vs.

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of California, Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

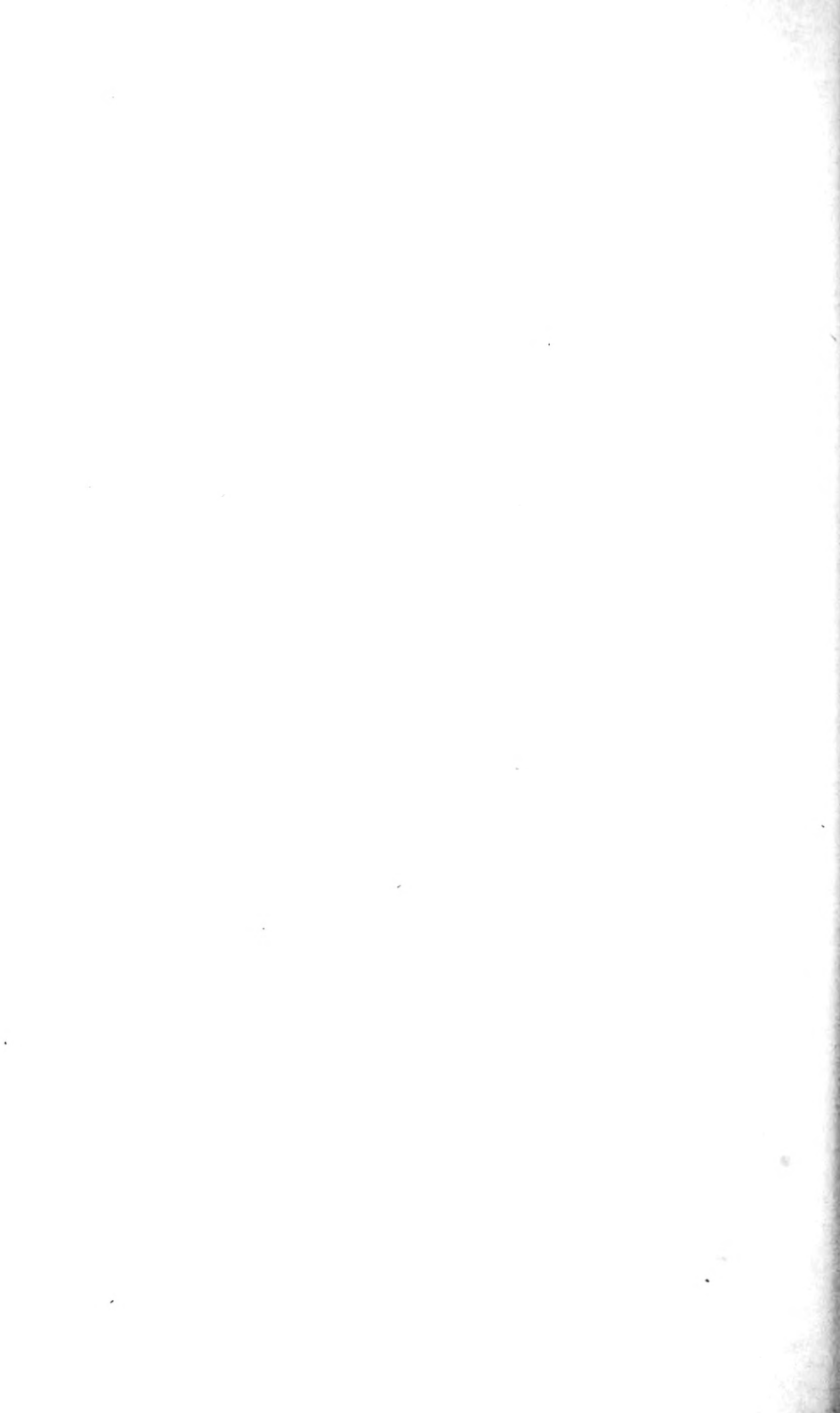
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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, in and for the
Southern District of California, Central Division.

No. 1532-BH

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the Estate of Marvin Polakof,
Plaintiff,

vs.

MARVIN POLAKOF, IVAN POLAKOF, JOHN
DOE ONE, JOHN DOE TWO, JOHN DOE
THREE, JOHN DOE FOUR, JANE DOE
ONE, JANE DOE TWO, JANE DOE
THREE,

Defendants.

COMPLAINT

(To recover property under Bankruptcy Act, to set
aside fraudulent conveyance and to quiet title.)

Comes now the plaintiff and for cause of action
against the defendants, and each of them, alleges:

I

That on or about the 5th day of December, 1940, in an action in the District Court of the United States for the Southern District of California, Central Division, entitled "In the Matter of Marvin Polakof, doing business as Ace Distributing Company, No. 37541M, in Bankruptcy", Marvin Polakof was duly adjudged a bankrupt. That thereafter, on or about the 14th day of January 1941, plaintiff

herein, Gustave L. Goldstein, was elected and appointed Trustee in Bankruptcy for the Estate of Marvin Polakof, doing business as Ace Distributing Company, and that the said plaintiff is now the duly qualified and acting Trustee in Bankruptcy of the above entitled Estate.

II

That prior to the commencement of this action, the above entitled Court made its Order authorizing, permitting and directing plaintiff to institute suit herein.

III

That jurisdiction of the above entitled court is conferred [2] thereupon by Section 67 and 70 respectively of the United States Bankruptcy Act, United States Code Title II, Chapter 7, Sections 107 and 110 respectively.

IV

That at all times between the 30th day of December, 1935 and the 6th day of December, 1940, the defendant, Marvin Polakof, was the owner and now is the owner of the property hereinafter described. That by reason of the order of the Court as aforesaid, all of the right, title and interest of the said Marvin Polakof in and to the property hereinafter described, is now vested in the plaintiff as Trustee in bankruptcy of the said Marvin Polakof and that the plaintiff at all times since on or about the 6th day of December, 1940, is the owner of the property described as that certain property situated in the County of Los Angeles, State of California,

and being the Southwest $\frac{1}{4}$ of Section 4, Township One, South Range 10, West S. B. B. & M., located in the County of Los Angeles.

V

That the defendants, and each of them, assert and claim an Estate or interest therein adverse to the plaintiff.

VI

That the claims of the defendants, and each of them, are without any right whatsoever and the defendants and each of them have no Estate, right, title or interest whatsoever in the said land or premises or any part thereof.

VII

That plaintiff is at the present time unaware of the true names of the defendants sued herein by the fictitious names of John Doe One, John Doe Two, John Doe Three, John Doe Four, Jane Doe One, Jane Doe Two, Jane Doe Three and prays leave of Court to amend this complaint by inserting their true names in lieu of said fictitious names, as aforesaid, when same are ascertained. [3]

For a second, separate and distinct cause of action, plaintiff alleges:

I

Plaintiff repeats and realleges each and every allegation contained in Paragraphs I, II and VI of the first cause of action and incorporates same

herein by reference thereto as if same were fully repeated herein.

II

That on or about the 30th day of December, 1935, the defendant Marvin Polakof purchased from one R. E. Allen, fee, interest and title to that certain real property situated in Los Angeles County, State of California and described as:

“S. W. $\frac{1}{4}$ of Section 4, Township One, South Range 10, West S. B. B. & M., located in the County of Los Angeles.”

That thereafter, Marvin Polakof held the said property and fee, interest and title thereto until on or about the 24th day of April, 1939. That on or about the 24th day of April, 1939, as aforesaid, the said Marvin Polakof did make, execute and deliver to defendant, Ivan Polakof, a Quit Claim Deed to the aforesaid property and that the said Deed was recorded in the Office of the County Recorder of the County of Los Angeles, on or about the said 24th day of April, 1939. That on the 24th day of April, 1939 and prior thereto, Marvin Polakof represented and held himself out to be the owner of the aforesaid property and that credit was extended to Marvin Polakof by certain of his creditors, upon the representation, and in reliance upon the fact, that the aforesaid property was in fact owned by Marvin Polakof.

III

That the aforesaid Deed, conveyance and transfer from Marvin Polakof, as aforesaid, to Ivan Polakof, was given, made and executed without value or consideration and that Ivan Polakof did not at any time give or pay or deliver to Marvin Polakof any consideration, [4] money or value whatever for the aforesaid Deed. That Marvin Polakof, Ivan Polakof, John Doe One, John Doe Two, John Doe Three, John Doe Four, Jane Doe One, Jane Doe Two and Jane Doe Three, on or about the 24th day of April, 1939, agreed and conspired with each other to transfer title to the aforesaid property from Marvin Polakof to Ivan Polakof with the intent, purpose and design to hinder, delay and defraud the creditors of Marvin Polakof and to conceal the right, title and interest of Marvin Polakof in and to the property as aforesaid, from the creditors of the said Marvin Polakof.

IV

That the plaintiff, as Trustee in bankruptcy, is the legal representative of the creditors of Marvin Polakof, bankrupt, and that the creditors of Marvin Polakof, bankrupt, who have filed claims in the aforesaid bankruptcy proceeding, were existing creditors on and before the 24th day of April, 1939.

V

That at the time of the filing of the aforesaid involuntary petition in bankruptcy, the said Marvin

Polakof was the owner and entitled to immediate possession of the property as aforesaid and that the plaintiff herein as Trustee in bankruptcy is now the owner and entitled to immediate possession of the property as aforesaid and that the property is part, parcel and an asset of the Estate of Marvin Polakof, Bankrupt.

Wherefore, plaintiff prays for judgment against the defendants and each of them as follows:

1. That the Court make its order adjudging and decreeing that legal title to the aforesaid property be in the plaintiff and that the defendants, and each of them, have no right, title or interest in and to the property as aforesaid.

2. That the conveyance and Deed from Marvin Polakof to Ivan Polakof concerning and affecting the title to the property described in the complaint be set aside, vacated and ordered to [5] be null and void and of no force or effect.

3. For an Order of the court giving and granting to the plaintiff immediate possession of the property described in the complaint.

4. For such other and further relief as to the Court may seem meet and just in the premises.

MAURICE J. HINDIN & JEROME ERLICH

By MAURICE J. HINAN

Attorneys for Plaintiff

(Endorsed): (Verified by Gustave L. Goldstein on May 13, 1941)

[Endorsed]: Filed May 13, 1941. [6]

[Title of District Court, and Cause.]

ANSWER

Comes now the defendant, Marvin Polakof, and answering for himself alone, admits, denies and alleges as follows:

First Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

II.

Defendant admits all the allegations contained in Paragraph I of plaintiff's First Cause of Action.

III.

Defendant alleges that he is without knowledge or belief sufficient to form a belief as to the truth of the allegations contained in Paragraphs II and III of plaintiff's First Cause of Action; defendant generally and specifically denies each and every allegation contained in Paragraphs IV, V and VI of plaintiff's First Cause of Action.

Second Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

II.

In the Second Cause of Action, the defendant admits the [7] allegations contained in the incorpora-

tion of Paragraph I of the first cause of action; alleges that he is without knowledge or belief sufficient to form a belief as to the truth of the remaining allegations contained in the incorporation of Paragraph II of the first cause of action; denies, generally and specifically, each and every allegation contained in the incorporation of Paragraph VI of Plaintiff's first cause of action.

III.

Answering Paragraph II of plaintiff's Second Cause of Action, this defendant admits that on or about the 30th day of December, 1935, he purchased from one R. E. Allen, fee, interest and title to that certain real property situated in Los Angeles County, State of California, and described as:

S. W. $\frac{1}{4}$ of Section 4, Township 1, South Range 10, West S. B. B. & M., located in the County of Los Angeles

this defendant alleges that on or about the 26th day of August, 1937, that he made, executed and delivered to one Ivan Polakof, a quitclaim deed to the aforesaid property; this defendant denies, generally and specifically, all the remaining allegations contained in Paragraph II of plaintiff's Second Cause of Action not heretofore denied or admitted.

IV.

Defendant, generally and specifically, denies each and every allegation contained in Paragraphs III and V of plaintiff's Second Cause of Action.

V.

Defendant alleges that he is without knowledge or belief sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of plaintiff's Second Cause of Action.

Wherefore: Defendant prays that plaintiff take nothing by his complaint herein, and that defendant recover his costs herein incurred.

JOSEPH J. COGEN

Attorney for defendant—Marvin Polakof,
609 Garfield Bldg., Los Angeles, Cal.

(Endorsed): Verified by Marvin Polakof Jun.
5, 1941

[Endorsed]: Filed Jun. 13, 1941. [8]

[Title of District Court and Cause.]

STIPULATION

(Amendment of Complaint)

It is hereby stipulated by and between the plaintiff herein and the defendants, Marvin Polakof and Ivan Polakof, by and through their respective counsel of record, that the plaintiff's complaint may be amended as follows:

By the addition thereto of the following paragraph VI. in the Second Cause of Action, as follows:

VI.

“That on or about the aforesaid 24th day of April, 1939 and continuing to date hereof, the said Marvin Polakof was insolvent and was without sufficient funds or property, other than the property referred to herein, sufficient to pay his creditors the sums due to them.”

It is further stipulated that the foregoing paragraph when added to the complaint on file herein may be deemed to be denied by the answer of the defendants and each of them.

Dated this 2nd day of October, 1941.

MAURICE J. HINDIN & JEROME ERLICH

By MAURICE J. HINDIN

Attorneys for Plaintiff

JOSEPH J. COGEN

Attorney for Defendants.

[Endorsed]: Filed Oct. 4, 1941. [12]

[Title of District Court and Cause.]

AMENDED ANSWER OF IVAN POLAKOF.

Comes now the defendant, Ivan Polakof, and answering for himself, alone, admits, denies and alleges as follows:

First Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

II.

Defendant admits all the allegations contained in paragraph I of Plaintiff's First Cause of Action.

III.

Defendant alleges that he is without knowledge or belief sufficient to form a belief as to the truth of the allegations contained in Paragraphs II and III of plaintiff's First Cause of Action; defendant, generally and specifically, denies each and every allegation contained in Paragraphs IV, V and VI of plaintiff's First Cause of Action.

Second Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

II.

In the Second Cause of Action, the defendant admits the allegations contained in the incorporation of Paragraph I of the First Cause of Action; alleges that he is without knowledge or belief suf-

[13]

ficient to form a belief as to the truth of the remaining allegations contained in the incorporation of Paragraph II of the First Cause of Action; denies, generally and specifically, each and every allegation contained in the incorporation of Paragraph VI of plaintiff's First Cause of Action.

III.

Answering Paragraph II of plaintiff's Second Cause of Action, this defendant alleges that on or

about the 26th day of August, 1937, a quit claim deed was made, executed and delivered to this defendant by one Marvin Polakof; that the aforesaid quit claim deed described that certain real property situated in Los Angeles County, State of California, and described as:

S. W. $\frac{1}{4}$ of Section 4, Township 1, South Range 10, West S. B. B. & M. located in the County of Los Angeles.

That the aforesaid quit claim deed was not recorded by this defendant until on or about the 24th day of April, 1939; that this defendant, denies, generally and specifically, all the remaining allegations contained in said Paragraph II of plaintiff's Second Cause of Action.

IV.

Defendant denies, generally and specifically, each and every allegation, contained in Paragraphs III and V of plaintiff's Second Cause of Action.

V.

Defendant alleges that he is without knowledge or belief sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of plaintiff's Second Cause of Action.

For a separate and affirmative defense to plaintiff's complaint on file herein, this answering defendant alleges:

I.

That on the day of, 1940, the Acampo Winery, a creditor of Marvin Polakof, and Marvin Polakof, one of the defendants in the above entitled action, entered into an agreement [14] wherein and whereby they agreed that the entire amount due to said creditor by said defendant, Marvin Polakof, would be the sum of \$6000.00, payable at the rate of \$500.00 per month, provided said indebtedness was guaranteed by one Percy Barker, also known as Percy Berkofsky; that said indebtedness was so guaranteed and that in furtherance thereof, twelve separate trade acceptances of \$500.00 each were executed by said defendant, Marvin Polakof, and payment thereof was guaranteed by Percy Barker, also known as Percy Berkofsky. That from and after the day of, 1940, the said Acampo Winery received the sum of \$2000.00; that said Acampo Winery have and still have in their possession eight of the aforesaid trade acceptances in the sum of \$500.00 each executed by said defendant, Marvin Polakof, and guaranteed by Percy Barker, also known as Percy Berkofsky. That as a result of the execution of said agreement, this answering defendant was induced to influence the said defendant, Marvin Polakof, to take said Percy Barker, also known as Percy Berkofsky into the business of said defendant, Marvin Polakof, and that said answering defendant, Ivan Polakof, was induced to change his entire position with respect to the defendant, Marvin Polakof.

II.

That all said acts and agreements were performed with the full knowledge, consent and acquiescence of said Acampo Winery, after a full disclosure to said Acampo Winery concerning the transfer of the aforementioned real property and discussion of other transactions involving certain excess charges by the said Winery, and that as a result thereof and in reliance on the acceptance of the aforesaid trade acceptances and guarantee, this answering defendant was induced to change his position.

III.

That the Trustee in Bankruptcy, the plaintiff in the above entitled action, has no greater rights than the aforesaid Acampo [15] Winery. That the Acampo Winery ought not to be admitted to say that they are existing creditor who were defrauded by the aforesaid conveyance between Marvin Polakof and Ivan Polakof, for the reason that the aforesaid allegations contained in this separate defense constitutes an estoppel against said creditor.

For a separate, affirmative and second defense to plaintiff's complaint on file herein, this answering defendant alleges:

I.

That the apparent net value of the aforesaid property at the time of the aforesaid conveyance did not exceed the sum of \$1500.00 over and above all encumbrances then existing, allowing for im-

provements since erected, and paid for by this answering defendant, Ivan Polakof, the transferee. That the unpaid claims of the existing creditors, who claim to have been defrauded, hindered and delayed by the aforesaid acts of the defendant, Marvin Polakof, in no case exceeds the sum of \$1105.00. That the Trustee in Bankruptcy, the plaintiff in the above entitled action, has no greater rights than the aforesaid creditors.

For a separate, affirmative and third defense to plaintiff's complaint on file herein, this answering defendant alleges:

I.

That in purchasing the aforesaid property, making repairs and constructing improvements, this answering defendant has paid in a sum of monies in excess of \$3000.00. That all the aforesaid payments for repairs and constructions were made by this defendant on the property which at all times he considers his own. That this defendant should have a preferred lien on the aforesaid property or a trust impressed upon it to the extent of all monies paid by him for the purchase thereof, for the payment of encumbrances, for the making or repairs and for constructing of improvements erected thereon.

Wherefore: This answering defendant prays:

[16]

1. That plaintiff take nothing by his complaint;
or

2. That the Court should find that this defendant should have a lien on the aforesaid property to the extent of the monies advanced by him for the purchase of the aforesaid property, for the making of repairs, for the payment of encumbrances, for the construction of improvements erected on the aforesaid property; or

3. That a trust be impressed upon the aforesaid property for the monies advanced by this defendant for the purchase of the aforesaid property, for the making of repairs and for constructing of improvements erected thereon, and for the payment of encumbrances;

4. That in the event the Court should find this defendant has received property fraudulently conveyed, this Court should not award a judgment in excess of the amount remaining unpaid to any creditors who existed at the time of the transfer;

5. For costs incurred herein; and

6. For such other and further relief as the Court may deem just.

JOSEPH J. COGEN

Attorney for Defendant—

Ivan Polakof [17]

State of California,
County of Los Angeles—ss.

Ivan Polakof, being by me first duly sworn, deposes and says: That he is the answering defendant in the above entitled matter; that he has read the foregoing Amended Answer and knows the contents

thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

IVAN POLAKOF

Subscribed and sworn to before me this 13th day of October, 1941

VICTOR S. COGEN (Seal)

Notary Public in and for said County and State.

[Endorsed]: Filed Oct. 14, 1941.

[18]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

The above entitled cause came on regularly for trial on the 14th day of October, 1941, before the Honorable Ben Harrison, Judge of the United States District Court, in and for the Southern District of California, sitting without a jury, a jury having been expressly waived; Maurice Hindin and Jerome Ehrlich, appearing as counsel for the plaintiff, and Victor S. Cogen appearing as counsel for the defendant, Marvin Polakof, and Joseph J. Cogen appearing as counsel for the defendant, Ivan Polakof, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for the decision, and the Court

being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the Court in said action are hereby made.

Findings of Fact

First Cause of Action.

I.

That each and all of the allegations set forth in Paragraphs I, II, and III of the First Cause of Action of plaintiff's complaint are true.

II.

That each and all of the allegations set forth in Paragraph [19] IV, VI, and VII of the First Cause of Action of plaintiff's complaint are untrue.

III.

That is is untrue that the defendant, Marvin Polakof, asserts a claim or interest adverse to the plaintiff. That it is true that the defendant, Ivan Polakof, asserts a claim and interest adverse to the plaintiff.

IV.

That it is true that on December 30, 1935, and ever since said time, the defendant, Ivan Polakof, and no one else, was, has been and now is the sole owner of the real property hereinafter described as: "S. W. $\frac{1}{4}$ of Section 4, Township One, South Range 10, West S. B. B. & M., located in the County of Los Angeles, State of California."

That it is true that the defendant, Marvin Pol-

akof, is not the owner of the said real property. That it is true that the plaintiff is not the owner of the said real property, and that the plaintiff has no right to the possession of the said real property.

Second Cause of Action.

I.

That each and all of the allegations contained in Paragraph I of the Second Cause of Action, reincorporating Paragraphs I and II of the First Cause of Action, are true.

II.

That each and all of the allegations contained in Paragraphs I of the plaintiff's First Cause of Action, reincorporating Paragraph VI of the First Cause of Action, is untrue.

III.

It is true that on or about the 30th day of December, 1935, the defendant, Marvin Polakof, became the record owner of a one-half interest in the aforesaid real property. That on or about May 15, 1936, the defendant, Marvin Polakof, became the record owner [20] of all the interest in the property, subject to a deed of trust in the sum of One Thousand (\$1000.00) Dollars. That on or about the 26th day of August, 1937, in Omaha, Nebraska, the said Marvin Polakof, did make, execute and deliver to the defendant, Ivan Polakof, a deed to the aforesaid real property and the said deed of

trust was recorded in the office of the County Recorder of the County of Los Angeles, State of California, on or about the 24th day of April, 1939.

IV.

It is true that on or about June 7, 1939, the defendant, Ivan Polakof, with his own funds, paid the One Thousand (\$1000.00) Dollar deed of trust secured by the said real property. That on or about the 26th day of June, 1939, a reconveyance on the aforesaid One Thousand (\$1000.00) Dollar deed of trust was recorded in the office of the County Recorder of the County of Los Angeles, State of California.

V.

It is true that on or about the 30th day of December, 1935, and ever since that time, the defendant, Ivan Polakof, has been and now is the sole owner of the aforesaid real property, and that the defendant, Marvin Polakof, on December 30, 1935, and ever since that time, never had any and now has no right, title and interest in and to the aforesaid real property.

VI.

It is true that the defendant, Marvin Polakof, never represented or *hold* himself out to be the owner of the aforesaid real property. It is true that none of the creditors of the said defendant, Marvin Polakof, ever extended to the defendant, Marvin Polakof, any credit or delivered any merchandise, services or personal property, relying on

the record ownership of the aforesaid real property by the defendant, Marvin Polakof. [21]

VII.

It is true that monies paid for the purchase of the real property, payment of the One Thousand (\$1000.00) Dollars deed of trust, and monies expended for repairs and upkeep of the real property was paid by the defendant, Ivan Polakof, from his own monies, and that no part of these monies were paid by the defendant, Marvin Polakof.

VIII.

It is true that the defendants, Ivan Polakof and Marvin Polakof, did not on the 24th day of April, 1939, or any dates prior thereof, or ever since that date agree and/or conspire with each other to transfer title to the aforesaid property from Marvin Polakof to Ivan Polakof with the intent and/or purpose and/or design to hinder and/or delay and/or defraud the creditors of Marvin Polakof and/or to conceal the right and title and interest of Marvin Polakof in and to the aforesaid property from the creditors of the aforesaid Marvin Polakof.

IX.

It is true that no badges of fraud whatsoever were present or involved in the acquisition of the record ownership in the name of Marvin Polakof (who was holding it for the real owner, Ivan Polakof), or the transfer of the record ownership of the real property from Marvin Polakof to Ivan Polakof.

X.

It is true that the plaintiff herein is not the owner of the aforesaid real property and is not entitled to the possession thereof, and that the said real property never was and now is not a part and parcel of the Estate of Marvin Polakof, Bankrupt.

XI.

It is true that on or about the 26th day of August, 1937, to and including April 30, 1939, the defendant, Marvin Polakof, was solvent and that the gross amount of his assets exceeded the gross amount of his liabilities. It is true that on August 26, 1937, [22] to and including April 30, 1939, the defendant, Marvin Polakof, had sufficient funds and/or property other than the aforesaid real property, sufficient to pay his then creditors any sums of monies due them.

From the foregoing facts, the Court concludes:

Conclusions of Law

And as conclusions of law from the foregoing facts, the Court finds:

1. That the defendant, Ivan Polakof, was during all times mentioned in the complaint and now is the sole owner in fee simple and is entitled to the immediate possession of the real property hereinbefore and in the complaint herein described, located in the County of Los Angeles, State of California, and more particularly described as: "S. W. $\frac{1}{4}$ of Section 4, Township One, South Range 10

West S. B. B. & M., located in the County of Los Angeles, State of California”.

2. That the plaintiff take nothing by reason of the complaint on file herein.

3. That, the claims of the plaintiff, Gustave L. Goldstein, as Trustee in Bankruptcy of the Estate of Marvin Polakof, Bankrupt, and the defendant, Marvin Polakof, and all persons claiming under them are without any right whatsoever, and said plaintiff and the defendant, Marvin Polakof, have no right, title or interest in and to said property or in the possession of said property; that all persons claiming under them are hereby enjoined and debarred from claiming or asserting any estate, right, title or interest in or claim or lien upon or possession of said real property, or any part thereof.

4. That the defendant, Ivan Polakof, is entitled to have and recover from the plaintiff and from the defendant, Marvin Polakof, the defendant's, Ivan Polakof, costs herein expended and taxed in the sum of \$

Dated: This 31 day of Oct., 1941, at Los Angeles, Calif.

BEN HARRISON

Judge of the District Court.

[Endorsed]: Filed Oct. 31, 1941. [23]

In the United States District Court, in and for the Southern District of California, Central Division.

No. 1532-BH

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy, of the Estate of Marvin Polakof,
Plaintiff,

vs.

MARVIN POLAKOF, IVAN POLAKOF, JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE FOUR, JANE DOE ONE, JANE DOE TWO, JANE DOE THREE,

Defendants.

JUDGEMENT BY COURT AFTER TRIAL.

The above entitled action, came on regularly for trial on the 14th day of October, 1941, before the Honorable Ben Harrison, Judge of the United States District Court, in and for the Southern District of California, sitting without a jury; Maurice Hindin and Jerome Ehrlich, appearing as counsel for the plaintiff, and Victor S. Cogen appearing as counsel for the defendant, Marvin Polakof, and Joseph J. Cogen appearing as counsel for the defendant, Ivan Polakof; and the action having been dismissed as to all the fictitious defendants designated by the names of John Doe One, John Doe Two, John Doe Three, John Doe Four, Jane Doe One, Jane Doe Two, Jane Doe Three; and evidence,

both oral and documentary, having been introduced by the respective parties hereto, and the Court having heard the evidence and the arguments of counsel, and having fully considered the same, and having made its findings of facts and drawn its conclusions of law;

Now, therefore, it is ordered, adjudged and decreed:

1. That the defendant, Ivan Polakof, was during all times mentionad in the complaint and now is the sole owner in fee simple and is entitled to the immediate possession of that certain real property situated in the County of Los Angeles, State of California, and more particularly described as: "S. W. $\frac{1}{4}$ of Section 4, Township [25] One, South Range 10, West S. B. B. & M., located in the County of Los Angeles, State of California", referred to and described in the complaint of the plaintiff's on file herein.

2. That the plaintiff take nothing by reason of the complaint on file herein.

3. That the claims of the plaintiff, Gustave L. Goldstein, as Trustee in Bankruptcy of the Estate of Marvin Polakof, Bankrupt, and the defendant, Marvin Polakof, and all persons who claim title under them in and to said real property, are without any right whatsoever; and that the said plaintiff, Gustave L. Goldstein, as Trustee in Bankruptcy of the Estate of Marvin Polakof, Bankrupt, and the defendant, Marvin Polakof, during all times mentioned herein never had and now have no right,

title, interest, claim or estate whatsoever in and to the said real property or any part thereof, and have no right to the possession of said real property. That the said plaintiff, Gustave L. Goldstein, as Trustee in Bankruptcy of the Estate of Marvin Polakof, Bankrupt, and the defendant, Marvin Polakof, and all persons claiming under them are hereby enjoined and debarred from claiming or asserting any estate, right, title or interest in or claim or lien upon or possession of said real property, or any part thereof.

4. That the said defendant, Ivan Polakof, have and recover from the plaintiff, Gustave L. Goldstein, as Trustee in Bankruptcy of the Estate of Marvin Polakof, Bankrupt, and from the defendant, Marvin Polakof, the defendant's, Ivan Polakof, costs herein expended and taxed in the sum of \$28.60.

Dated this 31 day of Oct., 1941, at Los Angeles, California.

BEN HARRISON

Judge of the District Court.

[Endorsed]: Judgment entered Oct. 31, 1941.

Docketed Oct. 31, 1941

Book C. O. #7 Page 233

[Endorsed]: Filed Oct. 31, 1941. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Defendants Marvin Polakof and Ivan Polakof,
and to their respective attorneys, Victor S.
Cogen Esq. and Joseph J. Cogen Esq.:

Please take notice that the plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment which was entered in this case on October 31, 1941.

Dated at Los Angeles, California, January 26, 1942.

MAURICE J. HINDIN & JEROME EHRLICH

By JEROME L. EHRLICH

Attorneys for Plaintiff

(Endorsed): Filed Jan. 29, 1942.

Copies mailed to Attys. for Defts. E. L. S. Rec'd
copy 1/29/42 JOSEPH J. COGEN. [28]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
OF
TESTIMONY AND PROCEEDINGS
ON TRIAL.

Appearances:

Maurice J. Hindin, Esq. and

Jerome Ehrlich, Esq.

For Plaintiff.

Joseph J. Cogen, Esq., and

Victor Cogen, Esq.

For Defendants.

Los Angeles, California, Tuesday, October 14, 1941,
10 A. M.

The Clerk: No. 1532 Civil, Gustave L. Goldstein,
trustee, vs. Marvin Polakof and others.

Mr. Hindin: Ready for the plaintiff.

The Court: Proceed.

Mr. Hindin: Has your Honor become familiar
with——

The Court: Yes. I don't care for an opening
statement. I have read the pre-trial statements and
I understand the issues.

Mr. Hindin: Very well. I desire to call Mr.
Marvin Polakof as an adverse party.

MARVIN POLAKOF,

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Marvin Polakof.

Direct Examination

Q. By Mr. Hindin: Are you the same and identical person who is the bankrupt in the action entitled in the Matter of Marvin Polakof, Bankrupt, No. 37541, in the District Court of the United States? A. I am.

Q. You are? [2*] A. Yes.

Q. Now, Mr. Polakof, calling your attention to the 30th day of December, 1935, did you have occasion to purchase a piece of real estate from one R. E. Allen?

A. As I recall, that property was purchased in my name. I didn't purchase the property.

Q. You didn't purchase the property?

A. No, sir.

Q. It was purchased in your name?

A. That is right.

Q. I show you——

The Court: Is it a certified copy?

Mr. Hindin: Yes, a certified copy.

The Court: It isn't necessary to have it identified, is it, counsel?

Mr. Joseph Cogen: No.

(Testimony of Marvin Polakof.)

Mr. Hindin: I offer it in evidence as Plaintiff's first in order.

The Clerk: Plaintiff's Exhibit 1.

Plaintiff's exhibit 1 is a Deed from R. E. Allen, as Trustee in Bankruptcy of Realty Mortgage Corporation to A. Fratkin and Marvin Polakof, dated October 30, 1935, covering the property involved in this action. The deed recites a consideration of \$2,625.00 and was recorded in the office of the Recorder of Los Angeles County on January 4, 1936.

Q. By Mr. Hindin: Now, at that time you purchased this property jointly with one A. Fratkin?

Mr. Joseph Cogen: Just a minute——

A. I didn't purchase the property.

Mr. Joseph Cogen: I object to that on the ground that it is assuming facts not in evidence. The witness has stated that the property was purchased in his name, but he [3] did not purchase it. Counsel asked him, "When did you purchase the property?" We want to make that distinction here, because the contention is that Mr. Marvin Polakof did not own the property.

The Court: You can ask him when he acquired it under this deed.

Q. By Mr. Hindin: When did you acquire the property under the deed? You were named as a grantee jointly with——

(Testimony of Marvin Polakof.)

The Court: Well, the instrument speaks for itself, counsel.

Mr. Hindin: I just want to identify the second instrument, which purports to be a deed from A. Fratkin to Marvin Polakof.

The Court: A certified copy?

Mr. Hindin: A certified copy.

The Court: Unless there is some objection it will be admitted. Let us not take any time proving certified copies.

Mr. Hindin: All right.

The Clerk: Plaintiff's Exhibit 2.

Plaintiff's exhibit 2 is a deed from A. Fratkin and Marvin Polakof, to Marvin Polakof, dated May 15, 1936, covering the same property. The deed recites a consideration of \$10.00, and was recorded on May 18, 1936.

Q. By Mr. Hindin: Did you make a deed to one Ivan Polakof, which is dated——

The Court: Is there any dispute about that?

Mr. Joseph Cogen: The execution? No, there is no doubt about the execution.

Mr. Hindin: All right. We will offer this. [4]

The Clerk: Plaintiff's Exhibit 3.

PLAINTIFF'S EXHIBIT 3

QUITCLAIM DEED

I, Marvin Polakof, of the County of Los Angeles, State of California, in consideration of the sum of Ten (10.) Dollars, to me in hand paid, the

(Testimony of Marvin Polakof.)

receipt of which is hereby acknowledged, do hereby remise, release and forever quitclaim to Ivan Polakof, of the County of Los Angeles, State of California, all that real property situated in the County of Los Angeles, State of California, described as follows:

“That portion of the southwest quarter of Section 4, Township I South, Range 10 West, S.B.B. & M. in the County of Los Angeles, State of California, described as follows:

Beginning at a point distant North 1 deg. 16' 30" East 660 feet from the South line of said quarter section, and distant North 89 deg. 54' 15" West 1340 feet from the East line of said quarter section, as said lines are shown on a map of the Puente and Azusa Bridge Road, recorded in Book 3842, Page 6 et seq. of the Deeds Records of said County, thence North 89 deg. 54' 15" West, parallel with the South line of said quarter section 330 feet, thence North 1 deg. 16' 30" East parallel with the east line of said quarter section 660 feet; thence South 89 deg. 54' 15" East 330 feet; thence South 1 deg. 16' 30" West 660 feet to the point of beginning.

Except therefrom a 30 foot strip along the North, South, East and West sides for street purposes together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

(Testimony of Marvin Polakof.)

To Have and to Hold to the said grantee, his heirs or assigns forever.

Witness my hand this 26th day of August, 1937.

MARVIN POLAKOF.

State of Nebraska,
County of Douglas—ss.

On this 26th day of August, A. D. 1937, before me, C. O. Darner, a Notary Public in and for said County and State, personally appeared Marvin Polakof, known to me, (or proved to me on the oath of), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] C. O. DARNER,
Notary Public in and for said County and State.
Commission expires May 18, 1941.

#832—Copy of Original recorded at request of Grantee Apr. 24, 1939, 10:53 A. M. Copyist #37. Compared. Maime B. Beatty, County Recorder, By W. Whitney, Deputy.

\$1.00-5.P.

Q. By Mr. Hindin: This property that is referred to in these certified copies is what is known as the Baldwin Park property, is it not; that is, it is located in Baldwin Park?

(Testimony of Marvin Polakof.)

A. That is right.

Q. Ivan Polakof, the grantee under this last conveyance, that is the conveyance which was last admitted in evidence, is your brother, is he not?

A. That is right.

Q. What was the purchase price of this property?

The Court: You mean originally?

Mr. Hindin: Yes.

The Court: Well, doesn't the deed speak the true consideration?

Mr. Hindin: I just want to know whether it does or not, your Honor. I think it is essential to establish that.

The Court: Here is a statement by the trustee in bankruptcy. I assume that the recitals in there would be accepted.

Mr. Hindin: Very well.

The Court: Is there any argument about that?

Mr. Joseph Cogen: No, your Honor.

Q. By Mr. Hindin: When this property was transferred by you to your brother what did you receive for it?

A. I received a letter from my brother, that is, while [5] I was at Omaha, Nebraska, and in this letter he explained to me that since I was contemplating marriage at that time and this property was actually his, that I should return it back to him. I was merely holding it for him as a matter of convenience, because at the time the property was

(Testimony of Marvin Polakof.)

purchased it was actually his property and he was making a trip east.

Mr. Hindin: I move that be stricken as not responsive to the question.

The Court: Motion denied. It will all come out, anyhow.

Mr. Hindin: All right.

Q. Did you receive any money from him at all for this transfer?

A. In the letter was enclosed, I believe, a check for \$10.

Q. You received \$10? A. That is right.

Q. For this property?

A. I beg your pardon. I did not receive \$10 for the property. In the letter was enclosed a check for \$10.

Q. And you executed then a deed to him?

A. I did.

Q. And in that deed the consideration expressed was \$10, was it not? A. That is right. [6]

The Court: The deed speaks for itself, counsel.

Mr. Hindin: All right.

Q. Do you know when this deed was recorded?

The Court: Doesn't the instrument speak for itself, counsel?

Mr. Hindin: Very well. The only point is that the date of recordation may become material in this case.

The Court: If he knows when it was recorded?

(Testimony of Marvin Polakof.)

Mr. Hindin: Yes.

The Court: You may ask him that question.

Mr. Hindin: You see, your Honor,——

The Court: No explanation is necessary. Go ahead with the evidence, gentlemen. I have permitted it; if he knows.

Q. By Mr. Hindin: Do you know why the deed was withheld from recording between the date that appears on the face of it and the date that it was ultimately recorded? A. No, I don't.

Q. At the date of the transfer what was the reasonable market value of that property?

A. I don't recall.

Q. Do you recall giving testimony in an examination before Referee Dickson on the 6th day of March, 1941?

A. I gave testimony before Referee Dickson at that time.

Q. Do you recall that you were questioned concerning [7] the value of that property?

A. Yes, I was.

Q. Now, let me read to you a question that was put to you at that time:

“Q. What was the value of the property at that time?

“A. At that time? Oh, between \$1500 and \$2500.”

Do you recall giving that testimony?

A. I recall giving that testimony.

(Testimony of Marvin Polakof.)

Q. What?

A. I believe I gave that testimony.

Q. Does that refresh your recollection as to the value of that property at the time of the transfer?

A. Yes. It does now.

Q. Did you receive any other property or money or thing of value, other than the \$10, for making this deed?

A. Will you repeat the question?

Mr. Hindin: Repeat the question, Mr. Reporter.

(Question read by reporter.)

A. I did not receive \$10 for making this deed.

Q. Did you receive \$10 at or about that time?

A. That is right.

Q. With the letter that requested you to make the deed?

A. That is right. I tried to explain to you that I was getting married.

Q. Did you receive any other property or money?

A. No, sir. [8]

Q. That was all you received?

A. Yes.

Q. Do you now know what the reasonable value of that property was about the 24th day of April, 1939?

A. Well, as you refresh my memory, between fifteen hundred and twenty-five hundred.

Mr. Hindin: That is all.

Mr. Joseph Cogen: No questions.

The Court: Call your next witness.

Mr. Hindin: Is the representative of the Acampo Winery here? Will you take the stand, please? [9]

H. E. GRAEBER,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: H. E. Graeber.

Direct Examination

Q. By Mr. Hindin: Mr. Graeber, what is your position or occupation?

A. I am the office manager and assistant secretary of the Acampo Winery and Distillers.

Q. That is a corporation, is it not?

A. Yes, sir.

Q. On or about the 24th day of April, 1939, was Marvin Polakof indebted to the Acampo Winery?

Mr. Joseph Cogen: We object to that, your Honor, on the ground that there is no showing as yet that there has been any transfer made in fraud of creditors. We feel that should be first presented to the court before he establishes any indebtedness.

The Court: The point in my mind is this: What difference does it make in 1939? The deed was executed in 1937.

Mr. Hindin: But the evidence, as appears from the face of it, shows there was no recordation of that instrument until 1939. And as to existing creditors, without notice of this deed, they are not charged with any knowledge of the transfer between the parties until—— [10]

The Court: You may proceed. Answer the question.

(Testimony of H. E. Graeber.)

A. Yes, sir. It was indebted to Acampo Winery.

Q. By Mr. Hindin: Do you have the books of the Acampo Winery with you at this time, or copies of them?

A. I haven't got the books. I have a copy of the—or not a copy, but the original accounts acceptable and trade acceptances receivable showing the accounts of the Ace Distributing Company.

Q. Is that a book of original entry?

A. No, sir. That is the individual account record.

The Court: Were those records kept by your company in the ordinary course of business?

A. Yes, sir.

The Court: Very well.

Q. By Mr. Hindin: Will you tell us, on the 24th day of April, 1939, what amount was due and owing from Marvin Polakof to the Acampo Winery?

Mr. Joseph Cogen: If the court please, in order that we may not be continuously making objections, may it be understood that we object and except to all of the answers of the witness to anything that occurred to show the indebtedness on April 24, 1939?

The Court: As you make your objections I will rule on them. Objection overruled.

A. \$9,388.29, approximately.

Q. By Mr. Hindin: How much? [11]

A. \$9,388.29, approximately. That is, as of April 30th. The way these books are kept the balances are run down at the end of the month, but that would be substantially the same on April 24th.

(Testimony of H. E. Graeber.)

Q. Substantially the same? A. Yes.

Q. Let me ask you this: Your concern is the same and identical company which has filed a claim in bankruptcy in the matter of the estate of Marvin Polakof, doing business as Ace Distributing Company? A. Yes, sir.

Mr. Hindin: At this time, your Honor, we will offer, by reference, the claims.

The Court: Can't you gentlemen stipulate a claim was filed, without the necessity of encumbering the record?

Mr. Joseph Cogen: Your Honor, in this matter I represent the defendant Ivan Polakof. He was not a party to the bankruptcy proceedings. I don't want to encumber the record, yet I want to ask for proof of everything in the claim, because I want to substantially cross-examine the witness on the matter.

The Court: All right. The claim may be introduced by reference.

Mr. Hindin: Thank you, your Honor. If it has been offered in evidence and received in evidence there is no necessity then, I take it, to go into the question. [12]

The Court: He has answered the question. He said he owed ninety-three hundred and some odd dollars.

Mr. Hindin: I am just inquiring whether your Honor wanted further testimony regarding the indebtedness as of the time of the bankruptcy.

The Court: No.

(Testimony of H. E. Graeber.)

Mr. Hindin: That is all, then.

The Court: Do you have any financial statements from these people?

A. I haven't them with me, your Honor.

The Court: Do you have any?

A. Yes; I think they are in the hands of our attorney.

The Court: Where are they now?

A. I imagine they are in Mr. Walther's office, in Los Angeles, here.

The Court: Are they going to be produced, gentlemen?

Mr. Hindin: No; I don't believe so.

The Court: Well, the court wants them. Let us find out if there has been any representations made as to the ownership of this property.

Mr. Hindin: Very well, your Honor. We will attempt to produce them.

The Court: They belong to your company, don't they?

The Witness: Yes, if they exist.

The Court: All right. I am going to direct you to obtain them and return here to court with them.

[13]

Mr. Hindin: I understand Mr. Walther will be a witness here, also, during the day.

The Court: I don't care how you produce them. But here is a \$9300 claim and I want to find out if there has been any representations made as to the ownership of this property.

(Testimony of H. E. Graeber.)

Mr. Hindin: Very well. That is all. Cross-examine.

Cross Examination

Q. By Mr. Joseph Cogen: How much was due your company in August, 1937: August 25th?

A. In August of 1937? I assume you mean at the end of August, approximately? \$4,175.33.

Q. \$4,175.33? A. \$4,175.33.

Q. Are you able to tell us how much merchandise was purchased from your concern from August 26, 1937, to April 24, 1939?

A. Yes: I would be in a position to tell you, but I would almost have to have an adding machine, I believe. From August until how far?

Q. Can you add it up now?

A. For how long do you want that? For what period did you say you wanted that?

Q. From October 26, 1937, up to and including the 24th day of April, 1939.

A. Well, that would be rather difficult to do here [14] without some paper or something to figure it.

The Court: Are there a lot of transactions?

Mr. Joseph Cogen: Quite a bit, your Honor.

The Court: I am not going to take the time to add them up in court, counsel.

Mr. Joseph Cogen: The idea is this, your Honor: That there were continuous business transactions between these parties: and in the last analysis there couldn't have been any intent to deprive them of any assets.

(Testimony of H. E. Graeber.)

The Court: Why don't you ask him generally what it would average? Run through a month or two.

Mr. Joseph Cogen: That would be fine, your Honor.

The Court: Take a month or two and find out what was the average amount of transactions. That will bring it out.

Q. By Mr. Joseph Cogen: What was the average amount of business you did with the Ace Distributing Company during that period of time, per month?

A. Oh, I would say approximately \$5,000 a month.

The Court: How much?

A. \$5,000. They purchased approximately \$5,000 worth; three or four lots of wine a month.

The Court: And how much were the approximate payments during that time?

A. Oh, the payments would be about the same.

The Court: Just slipping a little bit behind each month, [15] over a period of years?

A. Well, it is hard to tell whether or not the payments were made on the basis of trade acceptances. The trade acceptances were not always due on the day they were made. But I would say the payments were a little bit less. I wouldn't say from 1937 they were continually less, but towards the end they were continually less.

(Testimony of H. E. Graeber.)

Mr. Joseph Cogen: I didn't get the last answer.

A. I wouldn't say the payments were less from 1937 on, until the end of the purchases—toward the end.

The Court: Was there ever a period of time when they did not owe you any money?

A. I don't think so. Not since 1935, when we started doing business.

Q. By Mr. Joseph Cogen: How long after April 24, 1939, did they continue doing business with you?

A. How long after that?

Q. Yes.

A. The last purchase charged to the Ace Distributing Company on our books was on June 30th.

The Court: 1939?

A. June, 1940.

The Court: Have they paid you any money between 1939 and 1940? A. Oh, yes. [16]

The Court: In other words, they continued in their regular course of business up until about that time, when they started getting behind in large amounts? A. Yes, sir.

Q. By Mr. Joseph Cogen: Do you have your Trade Acceptance record here? A. Yes, I do.

Q. How much is the average price that they paid for wine that they purchased from your organization?

A. Well, that varied considerably.

Q. Before you answer that question, you may include all the government taxes in the price.

(Testimony of H. E. Graeber.)

A. That is a pretty hard question to answer over such a long period of time, on account of the fluctuation in wine prices, but I would say, including the tax, 50 cents, 55 cents, something like that.

Q. How much?

A. I am just guessing. It is an awfully hard estimate, over that period of time.

The Court: We don't want you to guess. If you don't know, say so.

A. It couldn't be determined without putting the figures down.

Q. By Mr. Joseph Cogen: Would you say it would not exceed 60 cents a gallon?

A. No, I wouldn't want to say that. [17]

Q. Was it as much as a dollar a gallon?

A. No.

Q. It wasn't? A. No.

Q. What type of wine did you ordinarily sell them?

A. Sweet wine, from 14 to 21 per cent, mostly.

Q. How did you sell it to them, in tank cars or barrels?

A. The biggest volume we did went in tank cars; some in barrels.

Q. At the time of the bankruptcy were there any bills remaining unpaid for merchandise which you sold them on or before the 24th day of April, 1939?

A. What was that question again, please?

Mr. Joseph Cogen: Will you read the question?

(Question read by reporter.)

(Testimony of H. E. Graeber.)

A. On the day of the bankruptcy? Was that April 24th?

Q. The date of bankruptcy was December 4, 1939.

The Court: What?

Mr. Joseph Cogen: December 4, 1940. I am sorry.

A. No. That is another question I couldn't answer without first analyzing this account.

The Court: Can you do that?

A. It will take me just a minute.

The Court: Won't the claim show it, gentlemen?

Mr. Joseph Cogen: I think it will. I want to show that——

The Court: What does the claim itself show, gentlemen? [18]

Mr. Joseph Cogen: Your Honor, there are two claims filed in bankruptcy; one known as Exhibit A, including invoices, and one known as Exhibit A revised. Exhibit A contains no invoices unpaid prior to December 1, 1939. It contains \$11,000 worth of purchases from December to May, 1940. It contains credits and adjustments of some \$3,385.30, with no date set—I presume it is on the basis of payments since these bills came in—leaving a balance of \$8,000. This is Exhibit A revised.

The Court. Is the revised claim any different?

Mr. Joseph Cogen: Yes, it is, your Honor.

The Court: Does it show——

Mr. Joseph Cogen: The revised claims show

(Testimony of H. E. Graeber.)

three invoices, dated preceding April 24, 1939, which remain unpaid.

Mr. Hindin: The record speaks for itself. They have been offered.

The Court: Only one claim was offered. Which one was offered?

Mr. Hindin: They are both combined, your Honor.

The Court: They are combined?

Mr. Hindin: Yes. One is just supplemental to the other.

The Court: What have you to say to that?

Mr. Joseph Cogen: I think the revised one was filed supplementary to this one.

The Court: The revised one shows the first item on [19] 9/18/39.

Mr. Joseph Cogen: There are some items below it, your Honor.

The Court: Oh, yes. Were these all handled through trade acceptances?

A. Yes, practically all.

The Court: In other words, on every shipment you would get a trade acceptance?

A. Yes.

The Court: How would you explain the difference between these two statements, one of them showing—

Mr. Joseph Cogen: Your Honor, if I may, I think I can bring that out to help the Court.

(Testimony of H. E. Graeber.)

The Court: All right. You may proceed.

Q. By Mr. Joseph Cogen: You have testified before that in no case did you sell the merchandise at a price of a dollar a case. I call your attention to three invoices, November 9, 1938. Invoice 3718; 750 gallons, and the price \$773.75. Is that correct?

A. I imagine so, if it is in there. Let me see what that covers.

Q. Did you have this schedule prepared?

A. Yes. I think that was bottled wine, which would include taxes and, naturally, would run more than a dollar a gallon. When you asked me that I was thinking of only the naked price of the wine. I am not sure, but I think this [20] is the invoice— isn't there an invoice attached to that?

Q. Yes. There are invoices attached.

A. Yes. You see, that is wine in bottles.

Q. You have already testified that it was your usual course, I believe, to send them wine in tank cars and barrels. On how many occasions did you send them wine in bottles?

A. I would have to consult the records, but I think about three or four times.

Q. As a matter of fact, it was actually three times, was it not?

A. I would have to look at these invoices.

The Court: Counsel, we are wasting time.

A. Yes, three times.

Mr. Joseph Cogen: Well, I am going to show that this merchandise was not sold to them, but it was consigned to them.

(Testimony of H. E. Graeber.)

The Court: Proceed. Get down to it.

Q. By Mr. Joseph Cogen: At the time you delivered the merchandise to the Ace Distributing Company what was their method of payment?

A. Usually they would give us a trade acceptance.

Q. When would that trade acceptance be signed?

A. Sometimes shortly after the load went down. Sometimes it took a long time after the load went down. In the case of the bottled wine it was almost a year before we got any settlement. [21]

Q. Did you attempt to collect those bills before the trade acceptances were signed?

A. Yes. We attempted to get trade acceptances on them, I am sure.

Q. Did you attempt to do that before you got your trade acceptances?

A. Well, I would not be in a position to answer that. That would be a matter of policy. Perhaps there were. I wouldn't know.

Q. On all the invoices except these three invoices you got trade acceptances immediately on delivery, did you not?

A. Not always. Sometimes it took 30 days to get the trade acceptance.

The Court: Did you have any trouble getting trade acceptances in any case except the bottled goods?

A. Yes, we did. They were slow coming through lots of times.

(Testimony of H. E. Graeber.)

Q. By Mr. Joseph Cogen: Wasn't it slow in coming through with reference to the merchandise that the Ace Distributing Company picked up for Acampo, for other accounts of Acampo, like Acme Distributing of Pasadena, F & M Bottling Company and Big Tree Wawona Winery?

Mr. Hindin: We will object to that on the ground it is complex.

Mr. Joseph Cogen: I will revise the question.

Q. Wasn't there a delay in signing trade acceptances [22] where they picked up merchandise for you from the Acme Distributing Company of Pasadena?

A. When I said—

The Court: Is that the same company?

Mr. Joseph Cogen: That is a different company. It is a distributor of the Acampo, a competitor of the Ace, who is in Pasadena.

The Court: What materiality has that?

Mr. Joseph Cogen: I am going to show, your Honor, that every time there was a delay in signing a trade acceptance that the reason for that was to save them from a loss if there was an adjustment, and until the matter was adjusted no trade acceptance was signed. But when regular merchandise was sent down to the Ace they signed a trade acceptance with a bill of lading.

Mr. Hindin: To which we will object on the ground that it is incompetent, irrelevant and imma-

(Testimony of H. E. Graeber.)

terial, not within the scope of any of the issues and not proper cross examination.

The Court: Well, I will let him go into that. Proceed.

Mr. Joseph Cogen: Will you answer the question?

The Court: Read it, please.

The Witness: Is it all right for me to explain that when I am talking about trade acceptances I was talking only about charges to Ace Distributing Company?

Mr. Joseph Cogen: Go ahead; say anything you want. It is all right with me. [23]

The Court: Proceed, gentlemen. There is a question pending. Read the question.

(Question read by reporter.)

A. Well, I know that such merchandise was picked up by Ace, but I wouldn't testify that those were the only trade acceptances which were held. It was the common practice.

Q. By Mr. Joseph Cogen: Was the same procedure followed in picking up material from the F & M Bottling Company of Los Angeles?

A. I am not familiar with that.

Q. You are not familiar with that. Was the same procedure followed in assisting Acampo with reference to the Wawona or Big Tree Winery?

A. If I recall correctly Ace picked up a load sent there that was consigned to them.

(Testimony of H. E. Graeber.)

Q. And wasn't the usual procedure over this period of years the same?

A. The trade acceptances, you mean? No; the trade acceptances would be mailed in the mail and sometimes wouldn't come back to our office for months.

Q. And what were the usual terms of the trade acceptance?

A. Well, over that period of time they varied.

Q. Let us refer to the period of August, 1937.

A. I think at that time they were made for approximately 90 days after date of delivery.

Q. And in April, 1939? [24]

A. About the same.

Q. In either of those periods were they considerably delinquent or were they paying close to the due date of the trade acceptance?

A. Well, there were considerable extensions. In other words, the trade acceptance would become due, we will say, then an extension would be made and new trade acceptance would be given to extend the time of payment. That happened quite regularly.

Q. Would you say what percentage of times it happened?

A. Well, that is kind of hard to say.

Q. Do you have any idea?

The Court: As I understand, they owed something like \$4,000 in 1939; over \$4,000.

Mr. Joseph Cogen: That was in 1937.

(Testimony of H. E. Graeber.)

The Court: How much in 1939?

A. That varied.

The Court: In August, 1939?

A. Approximately \$8300.

The Court: They were doing about \$5,000 worth of business a month, so they owed for about 60 days' purchases.

Q. By Mr. Joseph Cogen: The trade acceptances were for 90 days?

A. Not in all cases.

Q. That was a conservative average; is that right?

A. Yes; I think that would be just about the average [25] time.

Q. In these special bottled goods—referring to the three invoices you have testified to already—do you know anything about any particular deal as to those special bottled goods?

A. No, I do not.

Q. Do you know what the set-up was as far as payment or selling it was concerned?

A. No, I can't say that I do. In keeping the records, of course, I notice that the time was old and that there was no settlement made, but what the understanding was with some other officer who had charge of the sale, I don't know.

Q. Do you know whether the Acampo people at that time established a sales division down in Los Angeles, in the headquarters of Ace, for the purpose of selling Acampo bottled wine?

(Testimony of H. E. Graeber.)

Mr. Hindin: We will object to it as incompetent, irrelevant and immaterial; not proper cross examination.

Mr. Joseph Cogen: I am laying a foundation for the consignment of merchandise, your Honor, which is exactly what happened.

The Court: Suppose he does know of it, what difference does it make?

Mr. Joseph Cogen: If this merchandise was consigned no bill was intended for it.

The Court: Well, if he doesn't know——

Mr. Joseph Cogen: I am sorry. I am just trying to [26] refresh his memory.

The Court: Why don't you ask him if there was any arrangement for consignment?

Q. By Mr. Joseph Cogen: Did you have any arrangements to have men by the name of Menilla, Russo and Lenci sell that wine out of Ace in Los Angeles?

A. I don't know anything about such arrangement as that, because it would not be my premise to make such an arrangement with anybody. So I am not familiar enough with it to say yes or no.

Q. You did have such salesmen operating out of Los Angeles and they did receive some checks from your office?

A. Yes. I think at one time we paid them some expense checks, but what the arrangement was I don't know.

Q. Did the Ace Distributing Company or Mar-

(Testimony of H. E. Graeber.)

vin Polakof make any direct representation to you or before the 24th day of April, 1939, that he owned the piece of property known as the Baldwin Park property? A. To me personally?

Q. Yes, or to your company, to your knowledge?

A. I don't think I am qualified to answer that question.

The Court: To your knowledge?

A. No.

The Court: Did you ever hear of it?

A. No, I can't say as I did, except that it—just here recently. [27]

The Court: That is, since this litigation?

A. Of course, that wouldn't necessarily—

Mr. Joseph Cogen: I didn't get the witness' answer.

The Court: He said he never head of the Baldwin Park property until this litigation came up.

A. Of course, my not hearing about it wouldn't necessarily mean it wasn't in existence, because I wasn't in a position to know those matters if they were discussed with other officials in the company than I.

Q. By Mr. Joseph Cogen: Did you ever tell the manager of the Ace Distributing Company, Mr. Sam Polakof, that he was paying more for the wine than other outfits you were doing business with?

A. No.

The Court: What difference does that make, counsel?

(Testimony of H. E. Graeber.)

Mr. Joseph Cogen: Your Honor, I have here an amended answer—I omitted to file it; I am sorry; if I may file it with permission of plaintiff's attorney—in which we are setting up an estoppel and compromise, and one of the bases for the estoppel and compromise was the fact that they would get these bills straightened out, which I admit is part of my case for defense.

The Court: Well, put it in under defense, then.

Mr. Joseph Cogen: All right, your Honor.

Q. Did you ever receive any instructions as to how to apply payments of money which was received from the Ace [28] Distributing Company?

A. No, I don't think—the payments? I don't—

Q. If you don't understand the question I will reframe it.

A. Will you repeat that?

Mr. Joseph Cogen: Oh, that is all.

Mr. Victor Cogen: If your Honor please, I represent Mr. Marvin Polakof and I wonder if I could ask some questions to clear up a statement of \$2,000 paid, as shown on the claim there?

The Court: Yes.

Q. By Mr. Victor Cogen: Mr. Graeber, I will show you what has been introduced here as Exhibit A revised. Referring to a claim filed by the Acampo Winery & Distillers against the Ace Distributing Company, I note on the invoice on this Exhibit A three items which are the items which have not been paid, to-wit, November 9, 1938, \$773.75; January 5, 1939, \$111; January 25, 1939,

(Testimony of H. E. Graeber.)

\$813.91; then an item "Bottled wine from Acme \$635.75"; making a total of \$2,334.41. Underneath that is a statement "Less adjustments of \$660.01," leaving a balance of \$1668.40; then a cash payment of \$600, leaving a balance of \$1,068.40. I note at the bottom of this exhibit, \$2,000 paid by Bokofsky. Who is Mr. Bokofsky?

A. He was connected with the Ace Distributing Company.

Q. When you received this \$2,000, at that time the three [29] oldest bills that you had aggregated \$1,068.40; is that correct? A. Yes, I think so.

Q. As I have read it to you? A. Yes.

Q. Those were all bills that were incurred, according to the statement, prior to April 24, 1939; is that correct?

A. May I see that before I answer? [30]

Q. Yes.

A. Prior to April 24. Yes, that is right.

Q. In other words, the only bills that the company owed, prior to the date of the recordation of this deed on April 24, 1939, was the sum of \$1,068.40—— A. No, that isn't right.

Q. —which were unpaid at the time of the filing of this Exhibit A?

A. On April 24th the Ace Distributing Company owed us approximately \$8,300.

Q. But approximately \$7,000 of that was paid, which you gave them credit on the account; isn't that true?

(Testimony of H. E. Graeber.)

A. What date are you speaking of when you mention——

Q. This estate was filed in the bankruptcy court and the bankruptcy was about December 1, 1940. Prior to December 1, 1940 they had paid you approximately \$7,000 on account of the obligations due on April 24, 1939?

A. That is an awfully hard question for me to answer, because the volume of business we did with those people was quite large, and to say yes or no to a question like that——

Q. Were there any bills that were incurred prior to April 24, 1939 which were unpaid at the time of the bankruptcy and which bills are not marked on Exhibit A revised?

Mr. Hindin: To which we will object as being incompetent, irrelevant and immaterial. The effective date in a matter of this kind is as of the effective date of the transfer, [31] which was April 24, 1939.

Mr. Victor Cogen: That is what I am referring to.
The Court: Read the question.

(Question read by reporter.)

The Court: Objection overruled.

A. If I got the question correctly——

Q. By Mr. Victor Cogen: If you want to we will have the reporter read it, because I don't want you to be confused about any question.

The Court: Read the question, Mr. Reporter.

(Question read by reporter.)

(Testimony of H. E. Graeber.)

A. Well, there were these three that were prior to April 24, 1939.

Q. By Mr. Victor Cogen: Yes; but were there any other bills in addition to those that are marked on Exhibit A revised?

A. Exhibit A revised covers the entire indebtedness at the time of the bankruptcy.

Q. You received \$2,000 from a Mr. Bokofsky; is that correct? A. That is right.

Q. And you applied that on the account?

A. Yes, sir.

Q. If you applied the \$2,000 to the payment of the oldest bills that would be approximately \$1,000 more than sufficient to pay off these oldest bills; is that correct? [32] A. If that is done, yes.

Q. When you received money from the Ace Distributing Company, from April 24, 1939 to and including December 1, 1940, did you apply those moneys to any particular items?

A. In some instances I imagine they were applied to particular items. For instance——

The Court: Let me ask you this: You say you took trade acceptances? A. Yes.

The Court: Wouldn't you put them in the bank and pick them up at the bank?

A. Yes. In some cases they would come back unpaid and we would pick them up.

The Court: In other words, when you received a check it was for a specific trade acceptance?

A. Yes, sir.

(Testimony of H. E. Graeber.)

Q. By Mr. Victor Cogen: At the time you received the \$2,000 from Mr. Bokofsky was there any agreement drawn up at that time?

A. Yes, I believe there was.

Q. Do you have the agreement here?

A. No, I haven't.

Q. Where is that agreement?

A. I think that our attorney, perhaps, has it—a copy of it.

Q. Is there a copy in the City of Los Angeles?

[33]

A. I believe so.

Mr. Victor Cogen: I wonder if the court will direct the witness to bring that agreement in? I can't complete the cross examination without the agreement.

The Court: Is counsel familiar with the agreement?

Mr. Hindin: Yes, we are familiar with the agreement.

Mr. Victor Cogen: Do you have a copy of it, counsel?

Mr. Hindin: No, I don't have a copy of it. Mr. Walther is in court now, and I may ask him if he has a copy of the agreement, in order to save time.

The Court: Yes.

Mr. Hindin: Do you have a copy of it?

Mr. Walther: Yes, I have a copy at my office.

Mr. Hindin: At the lunch hour recess would you get it?

(Testimony of H. E. Graeber.)

Mr. Walther: I would be glad to.

The Court: Are you the man that has the financial statement?

Mr. Hindin: Yes. Do you have the financial statement that was offered to Acampo by Ace Distributing Company?

Mr. Walther: I have in my possession a financial statement that was signed by, I think, Sam Polakof.

The Court: The court wishes that, too.

Mr. Hindin: Very well, your Honor.

Mr. Victor Cogen: May the court then excuse the witness until the agreement——

The Court: Do you have any further questions you want [34] to ask at this time?

Mr. Hindin: Just one further question.

Redirect Examination

Q. By Mr. Hindin: Were, in fact, the payments which were received between April 24, 1939 and the date of the bankruptcy applied to preexisting obligations, or were they applied to current purchases, if you know?

A. They were just credited to the account.

The Court: Wouldn't those be payments for a specific trade acceptance?

A. Well, if the trade acceptance was delivered in the customary manner we did not receive those payments. We discounted the trade acceptance with the bank and the bank received the trade acceptance. I would say, yes, that they were applied to a specific trade acceptance.

(Testimony of H. E. Graeber.)

The Court: The record of the trade acceptances will show that, gentlemen.

Q. By Mr. Hindin: Do you have a record of the trade acceptances?

A. Yes, I have.

Mr. Hindin: May we have that in evidence, then?

Mr. Victor Cogen: Why not have the witness come back at 2 o'clock with all these exhibits and let's get through with them then?

Mr. Hindin: Very well. [35]

The Court: See if you can go into it during the recess and do your arithmetic before 2 o'clock.

Mr. Hindin: Very well. [36]

ELMER J. WALTHER,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hindin: Mr. Walther, what is your business or occupation?

A. I am an attorney at law.

Q. Calling your attention to the 24th day of April, 1939 was Marvin Polakof indebted to you at that time?

A. The Ace Distributing Company was indebted to me. If they are synonymous, he was.

Q. I see. You have filed, have you not, Mr. Walther, a verified claim in bankruptcy In the Mat-

(Testimony of Elmer J. Walther.)

ter of Marvin Polakof, doing business as Ace Distributing Company? A. Yes, I have.

Q. I show you what purports to be a verified claim, with a bill attached to it, for \$100, the bill bearing date April 7, 1939, and ask you if that sum was owing to you at that time.

A. Yes, it was.

Mr. Hindin: At this time we will offer the verified proof of claim in evidence, by reference to the file in the bankruptcy action.

Q. Has that sum ever been paid to you?

A. No, it hasn't. [37]

Q. The claim is still due and unpaid?

A. Yes, sir.

Mr. Hindin: That is all.

Cross Examination

Q. By Mr. Victor Cogen: Was that claim for services rendered before August 26, 1937?

A. I can't answer that offhand.

Q. Well, what was the claim? What were the services that were rendered in behalf of this claim?

A. The services consisted of representing the Ace Distributing Company, or Marvin Polakof, in connection with a hearing before the State Board of Equalization.

Q. When was that?

A. I am sorry, I don't know. My secretary is on a vacation and the file is a discarded file. I couldn't locate it.

(Testimony of Elmer J. Walther.)

Q. The name of the licensee or name of the party represented in the State Board of Equalization was Marvin Polakof, was it?

A. I believe that is correct.

Q. Did Marvin Polakof make any direct representation to you at that time that he owned property in Baldwin Park?

A. At the time of that hearing?

Q. Yes. A. No, he did not. [38]

Q. Did you rely in any way upon his owning property for the payment of your claim?

A. No, I didn't.

Q. What did you rely upon, Mr. Walther?

A. For the payment of the claim, you mean?

Q. Yes.

A. Oh, I don't know. The same as any other engagement. I didn't rely on anything in particular.

Q. You relied on the business as it was, did you not?

A. Yes. I simply accepted the engagement and that was all there was to it. I didn't rely on anything.

Mr. Victor Cogen: That is all.

Mr. Hindin: That is all. [39]

MISS KUHNE JANTZEN,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Kuhne Jantzen.

Direct Examination

Q. By Mr. Hindin: Miss Jantzen, what is your business or occupation?

A. Assistant collection manager of The May Company.

Q. Do you have in your possession or under your control the record of the accounts receivable of The May Company? A. I do.

Q. Will you kindly get your record now and ascertain whether or not Marvin Polakof was indebted to The May Company on or about April 24, 1939? A. Yes, he was.

Q. What was the amount of his indebtedness to The May Company on that day? A. \$18.96.

Q. \$18.96. When was that account incurred?

A. On the 20th day of May, 1937.

Q. Has anything been paid on that account?

A. Yes. We have had a few payments on it.

Q. What is the balance due on that account as of this [40] date? A. \$17.06.

The Court: No purchases? Is that a running account?

A. No. It is a sales contract. A conditional sales contract.

The Court: What was that?

(Testimony of Kuhne Jantzen.)

A. A gentleman's suit.

The Court: On a conditional sales contract?

A. Yes.

The Court: You didn't get the suit back?

A. Not yet.

Q. By Mr. Hindin: I show you what purports to be a proof of claim in the Matter of the Estate of Marvin Polakof, filed by The May Company, and ask you if that is the same and identical account as you have testified to as being the account which was due and owing as of April 24, 1939?

A. Yes, it is.

Mr. Hindin: At this time we will offer the verified proof of claim of The May Company, as it appears in the files of the Estate of Marvin Polakof in bankruptcy, in evidence as plaintiff's next in order.

The Clerk: By reference?

Mr. Hindin: By reference, yes. That is all.

The Court: When you sell a suit like that do you get any financial statement from the party?

A. We took a printed application from him.

[41]

The Court: Have you that?

A. Yes, I have.

The Court: May I see it?

A. Yes.

The Court: I can't understand that, with this man's business. It looks like he was a student, according to that statement, doesn't it?

(Testimony of Kuhne Jantzen.)

A. He had previously been a student. I think he was still a student.

The Court: There was no representation that he owned any property?

A. No, it was claimed that his parents owned the property.

The Court: Proceed.

Cross Examination

Q. By Mr. Victor Cogen: I note from information listed on the reverse side of this agreement, Mr. Polakof did not sign this information, did he?

A. Yes, he did.

Q. Well, he signed this portion of the agreement that is above the instrument; isn't that correct?

A. The credit information was all taken before the signature.

Q. At this time it shows him working as a clerk for Victor Cogen, an attorney, and also it shows verification of [42] that information; is that correct? A. Yes.

Q. You were not relying on any real estate or any security of real estate or ownership of real estate of Mr. Polakof, as a basis for credit?

A. No; we were relying on the information as shown; the fact that he was living at home with his parents; that his parents owned the property; that his occupation was verified and that he was employed.

(Testimony of Kuhne Jantzen.)

The Court: Let me see that again.

The Witness: The posting is on the one side; the contract is on the reverse side.

The Court: What does it mean down here?

A. The account has been transferred to the Retail Merchants' Credit Association, because it was unpaid.

The Court: It is a secured claim, isn't it, gentlemen?

Mr. Hindin: It isn't regarded as such in the file.

The Court: The contract calls for security.

Mr. Hindin: If the court please, there is an option granted to them to waive that security, which they have done by filing the claim in bankruptcy.

The Court: Go ahead. Proceed.

Mr. Hindin: I have no further questions.

The Court: Any questions, gentlemen?

The Witness: Your Honor, may I ask if there were letters accompanying the claim that were filed with the [43] reservation? Very often we make a reservation on conditional sales contracts.

The Court: Where is the claim that was filed? What are you referring to now as a reservation?

A. I don't know that I made it. In this case I did not. I attached a copy of the contract itself, which shows that title is retained in The May Company. Sometimes I make a reservation on the side

(Testimony of Kuhne Jantzen.)

of the claim, showing that we are reserving a right, in accordance with the contract. I wasn't sure whether I had in this case, or not.

The Court: Let me see the claim.

The Witness: It was attached to the copy of the contract in this case.

Q. By Mr. Hindin: There was no attempt by The May Company in this instance, was there, to reserve title to the suit?

A. I assume that a copy of the contract itself would be——

Q. No. I mean with reference to the bankruptcy.

The Court: That is what she has answered. She said she filed a copy of the contract. She assumed that was a reservation of title.

Q. By Mr. Hindin: You had no intention of getting the suit back by reason——

The Court: Just a moment, now, about what her intention was or what she did. She has made a statement of what she [44] has done.

Mr. Hindin: The point is this: As a matter of law, the effect of filing the claim——

The Court: The instrument will speak for itself. As a matter of fact, she testified she thought she had written on the side of it a retention of title. Well, I believe I will let her answer that question. You may proceed and ask the question.

Q. By Mr. Hindin: Did you intend to get the suit back by reason of filing this claim, or did you file the claim for the money?

(Testimony of Kuhne Jantzen.)

A. I filed a claim because I had been requested to file a claim in the bankruptcy matter. It is difficult, in merchandise of this kind, to tell whether the merchandise is still in existence or not.

Q. I see. In other words——

A. If the merchandise is in existence we have, on occasions, retaken wearing apparel.

Q. But you did accept, did you not, a 10 per cent dividend that was paid in lieu of the return of any merchandise, that is, in the regular course of bankruptcy administration, so far as——

Mr. Victor Cogen: We object to that on the ground that it is a double question. I assume she has received 10 per cent.

The Court: The legal effect of it is there, gentlemen.

Mr. Hindin: Very well. I have no further questions. [45]

GARY FREEMAN,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Gary Freeman.

Direct Examination

Q. By Mr. Hindin: Mr. Freeman, what is your business or occupation?

A. I am the credit manager of the Royal Credit Jewelers.

(Testimony of Gary Freeman.)

Q. Do you have under your charge or control the books of the accounts receivable of the Royal Credit Jewelers? A. Yes, I do.

Q. As of the 24th day of April, 1939 was Marvin Polakof indebted to the Royal Credit Jewelers?

A. Yes, he was.

Q. What does the record reveal to be the amount of the indebtedness? A. \$67.71.

Q. \$67.71. At the date of his bankruptcy in December, 1940 was there still an unpaid balance?

A. Yes. \$25.

Q. I will show you what purports to be the claim of the Royal Credit Jewelry Company for the balance due as of the date of the—I don't seem to find it. [46] A. This is it.

Q. That is hazy. A. Yes.

Mr. Hindin: At this time we will offer the claim of Royal Credit Jewelers in the Estate of Marvin Polakof, a verified claim, by reference.

Mr. Victor Cogen: To which we object on the ground that the claim itself indicates that it is a secured claim, a conditional sales contract, covering a man's watch, a ladies' diamond ring and ladies' wedding ring.

The Court: When were those purchased?

A. Well, they were purchased, your Honor, in March of 1938 and in July of 1938.

The Court: Did you ever get them back?

A. No, we haven't, your Honor.

(Testimony of Gary Freeman.)

The Court: I am going to let it in and let you gentlemen argue about that afterwards. It was a secured claim? You had a conditional sales contract?

A. Yes; on a conditional sales contract.

The Court: The claim speaks for itself.

Q. By Mr. Hindin: A general claim for money was filed in the bankruptcy estate, wasn't it?

The Court: The claim speaks for itself, counsel.

Q. By Mr. Hindin: Your organization received a 10 per cent payment on account, by the trustee in bankruptcy?

The Court: The record of the bankruptcy court will so [47] show.

Mr. Hindin: Very well.

The Court: Did you receive any financial statement at the time you got that?

A. None other than the credit application at the time the credit was extended.

The Court: Did he make any representation to any property holding?

A. Not in so far as the credit application was concerned.

Cross Examination

Q. By Mr. Joseph Cogen: Do you know what the Royal Credit Jewelers relied upon to give that credit?

A. Well, they usually rely on the statements contained in the application, plus a clearance through the Credit Association.

(Testimony of Gary Freeman.)

Q. How long have you been with the Royal Credit Jewelers?

A. For some time. More than a year.

Q. Did you listen to a discussion on that bill that I had with Mr. Cohen who, I believe, was the owner of Royal? A. Yes, I did.

Q. Do you remember Mr. Cohen saying something about there was a particular friendship between one of his ex-employees, a Mr. Roy Levinson, and Mr. Marvin Polakof? [48]

A. Yes, he mentioned something of that.

Q. And wasn't that the major reason——

The Court: Counsel, you can't get evidence in that way. If counsel hasn't any objection I have.

Mr. Joseph Cogen: That is all, your Honor.

Mr. Hindin: That is all. [49]

A. S. MENICK,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: A. S. Menick.

Direct Examination

Q. By Mr. Hindin: What is your business or occupation? A. I am an appraiser.

Q. Appraiser. Is that your business or do you do that as special work?

(Testimony of A. S. Menick.)

A. That is my business, yes.

Q. Are you connected with the Federal Bankruptcy Court? A. I am.

Q. How long have you been an appraiser?

A. Since 1937.

Q. You have continuously, since 1937, engaged in the business of appraising property?

A. I have.

Q. Calling your attention to property located in Baldwin Park and described as a portion of the Southwest quarter of Section 4, Township 1 South, Range 10 West of San Bernardino Base and Meridian, located in Los Angeles County, did you have occasion to inspect that property recently?

A. Yes, I did. [50]

Q. Are you familiar with the reasonable, fair market value of that property and property in that vicinity? A. Yes, I am.

Q. Were you familiar with the fair market value of that property and property in that vicinity in the month of April, 1939?

A. I had an occasion to make an appraisal approximately at that time; a little prior to that, I believe, in 1938.

The Court: Of this same property?

A. No; property close by.

Q. By Mr. Hindin: In the same vicinity?

A. Yes.

Q. Are you familiar with the fair market value of this property at that time?

(Testimony of A. S. Menick.)

A. Yes; that is, from our investigation.

Q. In your opinion what was the reasonable fair market value of this property as of the 24th day of April, 1939?

A. I would say it would be approximately the same as it is at the present time. It would be very little—

Q. What is that amount?

A. \$8,500.

Q. Approximately \$8,500? That is the property which the record title appeared in the name of Marvin Polakof until the 24th day of April, 1939, and appeared in the name of Ivan Polakof after that date; is that correct?

Mr. Victor Cogen: Answer if you know. [51]

A. I don't know that it was in Marvin Polakof's name. I know that the record in the assessor's office now shows the record title owner as Ivan Polakof.

Mr. Hindin: That is all.

The Court: What kind of property is it?

A. It is five acres of land located, I would say, between Baldwin Park and Azusa, over there near the San Gabriel Wash. It is altogether agricultural land and industrial property.

The Court: Is it improved?

A. Yes; it has an industrial building, a factory building 200 by 60, located on the property.

The Court: Is it on the highway?

A. Yes; it is just a block off of Bonita Avenue

(Testimony of A. S. Menick.)

or Bonita Street. I think it is also known as Highway, and improved highway.

The Court: You say you figure there was no change in the value between 1937 and 1939?

A. No; 1939 and the present time.

The Court: 1939 and 1941?

A. Yes. I would say it is approximately the same.

The Court: That is all.

Cross Examination

Q. By Mr. Victor Cogen: On how many occasions have you been in the vicinity of Baldwin Park for the purpose of appraising property, since 1939? [52]

A. Since 1939? Well, not in this immediate vicinity; but in Azusa; this other piece of property that was appraised the latter part of 1938.

Q. What type of property did you appraise in 1938?

A. It was practically the same type of property as this is.

Q. Will you tell the court what it is? I don't know just what kind it is.

A. Well, it had—it was approximately 20 acres of the same type of ground, with an improved factory building, similar type of building and, I believe, approximately the same size building as on this property.

(Testimony of A. S. Menick.)

Q. What type of soil did you find there and, if so, did you make any tests?

A. You mean this property or the other?

Q. I mean this particular property that we have under discussion, the Baldwin Park property.

A. The Baldwin Park property? Well, I didn't make any tests, but I think it is agricultural to the same extent.

Q. What do you mean by agricultural to the same extent?

A. That it can be used for growing agricultural products.

Q. Mr. Menick, we are trying to get down to a basis of what you made your estimate. Please answer the question and don't digress. What type of agricultural products would you say?

A. The property surrounding it has fruit trees—
[53] orange trees.

Q. All right. Did you make any tests of the surrounding property to see what type of soil it was, if it was identical with the soil that was on this particular property?

A. No; I made no tests.

Q. You know that in Southern California we have a great variety of soils, don't you?

A. Yes.

Q. And we have lands adjacent to each other, and one type of agricultural products can be raised on one piece of property and it can't be raised on the adjoining piece of property; that is true, isn't it?

(Testimony of A. S. Menick.)

A. Yes, it is.

Q. Did you see any agricultural products on this property? A. Not at the present time.

Q. Do you know whether any was raised in 1939?

A. I don't.

Q. Do you know whether there was any attempt to raise any agricultural products on this property from the time people first came into California up to the present time?

A. I wouldn't know that.

Q. Then you didn't make any trial tests to find out whether or not this property——

The Court: He has answered that.

Q. By Mr. Victor Cogen: When you were making this [54] appraisal you were basing it on the fact that some sort of agricultural products could be raised there; is that right?

A. Not necessarily; no.

The Court: You said there was a factory building. How old is it?

A. The building was built in 1925 or 1926.

The Court: Of what material?

A. Made of concrete. Hollow concrete tile.

The Court: Is it in use?

A. Yes, it is.

The Court: For what purpose?

A. There is a boat building plant located there.

Q. By Mr. Victor Cogen: Do you know what rental the man was paying? A. Yes, I do.

Q. How much was the rent?

(Testimony of A. S. Menick.)

A. He told me he was paying \$40 a month.

Q. \$40 a month. Then the income was \$480 a year, isn't that right?

A. Under that arrangement, yes; but I don't think——

Q. Just answer the question, please. How much were the taxes against this property?

A. I don't know what the taxes are.

Q. Well, you were sent out to appraise the property. Weren't you interested in the amount of the taxes?

A. Not necessarily, in arriving at a valuation.

[55]

The Court: Did you ascertain the assessed valuation? A. I did of the land, yes.

The Court: What is it?

A. \$580, I believe.

The Court: What did the assessed valuation include?

A. I didn't check that. \$530 for the land.

The Court: What did you estimate the value of the building?

A. The building I estimated at the present time as approximately \$7,000 to \$7,500.

The Court: What would be the cost of replacing it at this time?

A. The replacement cost would be from \$10,000 to \$12,000.

Q. By Mr. Victor Cogen: Where did you get

(Testimony of A. S. Menick.)

the information about the assessed valuation of the land?

A. From the county assessor's office.

Q. The county assessor's office. Is that the book where they have all the various properties, and then on the side they have the assessed valuation?

A. Yes.

Q. And did that book have the assessed valuation of the building, in addition to the land?

A. I assume it did, but I didn't see it.

Q. Well, you were looking at it, weren't you?

A. Yes. [56]

Q. What type of improvement was there outside of the hollow concrete wall?

A. I don't know what you mean by the question.

Q. Well, you found a building there, didn't you?

A. Yes.

Q. How big was it?

The Court: I think we have heard enough on that.

A. 200 by 60.

Mr. Victor Cogen: I want to show, your Honor, that the value, from an examination alone, couldn't be relied upon, because it is merely, as I see it, just going out there and looking——

The Court: Why don't you ask him, "How much time did you spend out there?"

Mr. Victor Cogen: All right, your Honor.

The Witness: I spent approximately half a day.

Q. By Mr. Victor Cogen: All right. Now, have you been in the building business?

(Testimony of A. S. Menick.)

A. Not myself; no.

Q. Did you ever build a building of the type of construction of that building out there?

A. No, I haven't.

Q. Did you take the dimensions of this building and the plans, and try to ascertain from a contractor what he would reproduce the building for?

A. Not this particular building, but I have——

[57]

Q. I am just asking you about this building.

A. Not of this particular building; no.

The Court: The size of the building is what?

A. 200 by 60. 12,000 square feet in area.

Q. By Mr. Victor Cogen: Did you look at the roof of the building? A. Yes, I did.

Q. What condition did you find it in?

A. It wasn't in very good condition.

Q. And the building itself hasn't been painted for years, has it?

A. I don't believe that type of building requires paint.

Q. Did you find the building in A-1 condition?

A. Well, not A-1 condition, considering that the roof is in bad shape.

Q. This building is approximately 16 years old, isn't it? A. Yes, sir.

Q. Do you know what the average life of this building would be considered?

A. I think they figure 50 years.

(Testimony of A. S. Menick.)

Q. What do you mean, you think they figure?

A. That is my understanding.

Q. Where did you get your understanding?

A. In discussing with builders and contractors.

Q. Have you seen any of those buildings of the age of 50 years? [58]

A. I don't believe there is any of them in that vicinity that have been built that long.

The Court: What was the building constructed for?

A. Well, I imagine a manufacturing place.

The Court: Has it a concrete floor?

A. A concrete floor; yes, sir.

Q. By Mr. Victor Cogen: Do you know the last time when a manufacturer occupied that building?

A. No, I don't.

Q. Is there a manufacturer located close to that building?

A. Yes; there is one right across the street.

Q. Where is the next one after that?

A. I believe there is another one about a block away.

Q. And where is the next one after that?

A. Well, I don't know. There are about half a dozen, I think, right in that immediate vicinity.

Q. And those are smaller buildings, aren't they?

A. Well, some of them are larger buildings than this.

Q. This isn't considered a manufacturing district, is it?

(Testimony of A. S. Menick.)

A. Well, I think it is, to a certain extent. There are quite a few manufacturing businesses in the district.

Q. When I am talking about "district" I mean one like we have in Los Angeles or Long Beach or Santa Monica.

The Court: Gentlemen, as far as the court is concerned [59] you are taking up too much time on the value of this property. I will listen to the different experts. I know how a lot of these fellows appraise property, and if there is any question as to the value I will listen to your experts.

Q. By Mr. Victor Coghen: Did you advise with any banks in the vicinity to find out how much they would loan against this building?

The Court: I am going to instruct the witness not to answer that question. It is immaterial.

Q. By Mr. Victor Cogen: Did you ask any banks in the vicinity as to their appraisal of the property?

Mr. Hindin: We will object on the same grounds.

The Court: I will permit that question.

A. No, I didn't.

Q. By Mr. Victor Cogen: Did you communicate with any lending institutions—

Mr. Hindin: Same objection, your Honor.

Mr. Victor Cogen: Pardon me. I didn't get through.

Q. —as to the value of the particular property in question?

(Testimony of A. S. Menick.)

Mr. Hindin: Same objection, on the ground that it is immaterial, incompetent and irrelevant.

The Court: I am going to overrule the objection.

A. No, I didn't.

Mr. Victor Cogen: That is all, your Honor.

The Court: That is all. Call your next witness.

[60]

E. K. ALBRIGHT,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: E. K. Albright.

Direct Examination

Q. By Mr. Hindin: Mr. Albright, what is your business or occupation?

A. Real estate broker.

Q. You are a real estate broker?

A. Yes, sir.

Q. Are you engaged in that business at this time?

A. I am.

Q. Were you engaged in that business around the month of April, 1939? A. I was.

Q. Are you familiar with the fair market value of property in Baldwin Park, particularly the property described as a portion of the southwest quarter of Section 4, in Township 1 south, Range 10 in that vicinity? A. I am.

(Testimony of E. K. Albright.)

Q. How long have you been familiar with property in that vicinity? A. Since 1926.

Q. Do you reside in that vicinity yourself?

A. I do. [61]

Q. Did you engage in buying and selling real estate in that vicinity? A. I did.

Q. Are you familiar with this particular piece of property in which Marvin Polakof and Ivan Polakof are interested? A. Yes. I built it.

Q. You built that? A. Yes, sir.

Q. In the month of April, 1939, what, in your opinion, was the reasonable and fair market value of that property? A. About \$9,500.

Q. About \$9,500? A. Yes, sir.

Q. What, in your opinion, is the reasonable and fair market value of that property at this time?

A. Approximately \$10,000.

Q. What is that property like? I mean, what does it consist of?

A. It consists of five acres of land located on the corner of French Avenue and Fourth Street, and improved with a concrete block building, a concrete floor, 60 by 200, sky lights, and divided into partitions. It was originally built for the California Law Publishing Company. It has an 18-inch concrete floor over a portion of the floor space; steel truss windows all around; steel truss skylights; [62] metal doors; and the interior is divided into office space and industrial division portion. It is wired with heavy construction conduits. It has two sets of toilets and showers. The sanitary condition is

(Testimony of E. K. Albright.)

taken care of by cesspool. The water condition is ably serviced by a 6-inch steel main running 900 feet along the property. The gas is installed by a 3-inch gas line; it has telephone service and power line. It is 300 feet from a railroad and it is located in a general industrial area.

Q. What is the building suited for?

A. For most any kind of manufacturing purpose.

Q. Are you acquainted with Mr. Marvin Polakof, who is seated at the counsel table? A. I am.

Q. Did you have occasion to confer or discuss with him about this property between 1937 and 1939? A. I did.

Q. Did you have occasion to discuss this property with him after 1939? A. I did.

Q. Did he ever declare to you that he did not own that property?

A. No; he did not declare that.

The Court: I think you had better ask him what he said.

Q. By Mr. Hindin: Let me call your attention to one occasion. Did you have occasion to go with Mr. Polakof to [63] a zoning commission hearing?

A. With Ivan Polakof—yes, with Marvin Polakof.

Q. With Marvin? A. Yes, sir.

Q. With Marvin Polakof. When was that?

A. About 1939. In 1939.

Q. In 1939? A. Yes, sir.

Q. Do you remember what month it was?

(Testimony of E. K. Albright.)

A. It was in the summer. It was July.

Q. In July, 1939? A. Yes, sir.

Q. You went with Mr. Polakof. Where did you go with him? A. To a planning commission.

Q. A planning commission?

A. In Los Angeles.

Q. And at that time there was a matter with reference to the use of this property, was there not?

A. Yes, sir.

Q. At that time did you have a conversation with Mr. Marvin Polakof relative to this property?

A. Yes, sir.

Q. At that time did Mr. Polakof make any statement to you as to the ownership of this property?

A. No; he did not. I needed Mr. Polakof to sign a [64] zoning variance. I built a shed over there and they required a zoning variance.

Q. Did you ask Mr. Polakof whether he was the owner of that property?

A. No. I was so familiar with the situation I didn't have to ask the question. As a matter of fact, I sold the property to them and was very familiar with the conditions.

Q. You sold the property to Mr. Marvin Polakof? A. Yes, sir.

Q. You knew that Mr. Polakof owned the property at that time?

Mr. Victor Cogen: Just a minute. I object to that on the ground that it calls for a conclusion of

(Testimony of E. K. Albright.)

the witness, that he knew that Mr. Polakof owned the property.

Mr. Hindin: I will reframe the question.

The Court: He said he sold it to him.

Mr. Victor Cogen: Well, see if he is referring to 1935 or 1937 or 1939.

A. In 1935. It might have been 1936. I have the lease here. I leased it for them. First I sold it to Mr. Polakof, then I leased it for them.

Q. By Mr. Hindin: You represented Mr. Polakof, after you sold the property to him, for the purpose of leasing it? A. Yes, sir.

Q. When you asked Mr. Polakof to sign this zone variance did you ask him to sign as owner of the property? [65] A. Yes.

The Court: If he signed any lease, produce it, please. I am not going to take secondary evidence.

Q. Mr. Hindin: Do you have that petition, then?

The Court: That is a matter of public record, isn't it?

The Witness: Yes.

Mr. Hindin: Well, it has been my experience that records of the zoning commission are not available.

The Court: Then you will have to establish that fact.

Q. By Mr. Hindin: At any rate, did Mr. Polakof declare to you that he was the owner of the property?

(Testimony of E. K. Albright.)

The Court: You have asked him that. He said Marvin Polakof never said anything about owning the property; never made any declaration one way or the other.

Q. By Mr. Hindin: Well, you had a conversation with Mr. Polakof, did you not, at the time you wanted him to sign this variance petition?

A. I just asked him to sign it. I told him that the zoning commission required the signature of the owner of the property for the requested variance.

Q. What did he say?

A. That he would come up and sign the petition—the request for the variance.

Q. Between 1935 and 1939 you leased the property for Mr. Polakof? A. Yes, sir. [66]

Q. Whom did you consult with reference to the terms of the lease? A. Mr. Sam Polakof.

Q. Who was it that leased the property?

A. The True-X Chemical Company.

Q. What was the rental value of the property at that time?

Mr. Victor Cogen: Just a minute. We object to it. The lease is the best evidence, if there was a lease.

The Witness: I have a copy here.

Q. By Mr. Hindin: Do you have a copy of the lease here?

A. Yes, sir.

(Testimony of E. K. Albright.)

Q. Will you produce it for us, please?

A. Here it is.

Q. Was the original of this lease signed in your presence? A. Yes, sir.

Q. By whom? A. Mr. Sam Polakof.

Q. Was Mr. Marvin Polakof there?

A. No, sir.

The Court: Sam signed it?

A. Sam; yes.

The Court: Who is Sam?

A. The father. The father of Marvin. [67]

Q. By Mr. Hindin: When you went up to the zoning commission who went with you, Sam or Marvin?

A. No; only Mr. Marvin Polakof.

Q. Marvin Polakof?

A. I had to go down and ask Mr. Sam Polakof that the owner must sign, and he told me that Marvin Polakof would come up and attend to that.

Mr. Victor Cogen: We object to that, your Honor. It is hearsay.

The Court: That is hearsay. It may go out.

Q. By Mr. Hindin: Was Mr. Marvin Polakof there when you had this conversation with Sam?

A. No. I arranged a meeting——

Mr. Victor Cogen: Just a minute.

Mr. Hindin: Pardon?

A. I arranged a meeting with Mr. Marvin Polakof for the variance of the zoning commission.

Q. I am talking about this other conversation

(Testimony of E. K. Albright.)

you had with Mr. Sam Polakof. Was Mr. Marvin Polakof there at the time? A. No.

Q. He wasn't? A. No.

Mr. Hindin: All right. That is all.

Cross Examination

Q. By Mr. Victor Cogen: Until the time that this [68] lease was signed in July 1936, was the property occupied or unoccupied?

A. It was unoccupied.

Q. Did you endeavor at that time to get a lease?

A. Just which of the periods do you mean?

Q. From 1935 until July, 1936.

A. It wasn't occupied.

Q. Did you endeavor during all that time to get a tenant? A. Yes.

Q. Did you obtain the best tenant you could get for the property? A. Yes.

Q. And the first part of the rental for that period for which the lease was signed was for \$50 a month? A. And taxes; yes, sir.

Q. In this lease do you remember whether or not there was an option to purchase? A. Yes, sir.

Q. And how much was that option to purchase for? A. \$6,500.

Q. At the time this lease was signed did you make any expression as to the fairness of that price? A. Yes. It was a low price.

Q. As a matter of fact, Mr. Albright, didn't you

(Testimony of E. K. Albright.)

induce the purchase of this property on the basis of speculation in condemnation proceedings? [69]

A. No, sir.

Q. Didn't you at that time, or a later time, make a statement or prepare a statement that the property was worth up to \$30,000, for condemnation proceedings? A. I did not.

Q. How high a valuation did you make it?

A. \$27,500.

Q. In condemnation proceedings?

A. Yes, sir.

Q. When was that value set?

A. In 1939, when the Santa Fe dam proceedings took about three years of negotiations. And the county appraised—they concurred in the general valuation, between twenty and twenty-seven thousand dollars. Then they changed the line of the dam and government agents then came along—the appraisers—and they reduced the appraised valuation, in their estimation, to \$17,000. And then the line was changed again on account of a great many factors which we had there; the dam was moved west; and they are not taking in any factory buildings at this time.

Q. Then you prepared a valuation for the appraisal of the land to the United States government, which was to be condemned for dam purposes——

A. Yes, sir.

Q. —at a price which you estimated to be \$27,000; is that right? [70]

A. Yes, sir.

(Testimony of E. K. Albright.)

The Court: Of this same property?

Mr. Victor Cogen: Yes, sir.

The Witness: I built the building. It cost twenty-thousand dollars to build. We paid exactly \$22,500.

Mr. Victor Cogen: You are volunteering an answer, now.

Mr. Hindin: Let him explain that answer.

Mr. Victor Cogen: You can examine him on re-direct, if you wish. I have no objection.

The Court: Well, the court takes almost judicial notice of the method in which they appraise property if they want to sell it to the federal government.

Q. Mr. Victor Cogen: As a matter of fact, the people who leased this property before, whom you describe as a chemical company, did not complete their lease, did they? A. They did not; no.

Q. They did not take up their option to purchase, did they? A. No, sir.

Q. This lease was signed by Sam Polakof, wasn't it? A. Sam Polakof; yes, sir.

Q. As the owner; is that true? A. Yes.

Q. You were dealing with him as the owner at that time, were you not?

A. With Sam Polakof. [71]

Q. Did Marvin Polakof ever pay any money for the purchase of that property to any escrow transaction, that you know of? A. No.

Q. Did you ever see any money come through Marvin Polakof's hands? A. No, sir.

(Testimony of E. K. Albright.)

Q. The money that you received went through the hands of Sam Polakof, did it not?

A. Yes, sir; Sam Polakof. My dealings were solely with Sam Polakof.

Q. Some time during April, May or June of 1939, did you come to my office? A. Yes, sir.

Q. With reference to this property?

A. Yes, sir.

Q. Did you tell me at that time that Ivan Polakof wanted to clear title to this property and you wanted me to go down to the Title Insurance Company and prove the title? A. Yes, sir.

Q. Did I then go down to the Title Insurance Company and spend the better part of a morning checking title with them? A. Yes, sir.

Q. Did I not clear up with them the question of a judgment of record against the property? [72]

Mr. Hindin: Just a second. We will object to that as being immaterial, as to what counsel did with the Title Company.

Mr. Victor Cogen: I am laying a foundation as to the knowledge of the owner.

The Court: I think it goes to his knowledge of ownership, because he has said Marvin was the owner.

Mr. Victor Cogen: He has already said Sam was the owner.

The Court: Yes. Go ahead. Proceed.

Mr. Victor Cogen: Read the question, Mr. Reporter.

(Question read by reporter.)

(Testimony of E. K. Albright.)

A. I wouldn't say they cleared it up.

Q. By Mr. Victor Cogen: Was it clear when you left the room? A. It wasn't.

Q. Didn't you leave the room in a high temper?

A. Yes.

Q. Because they wouldn't clear it up?

A. That wasn't the point.

Q. You heard about it a few days later and it was clear, wasn't it?

Mr. Hindin: I object to that as calling for a conclusion of the witness.

Q. By Mr. Victor Cogen: You were notified it was clear, weren't you?

The Court: We are getting far afield, counsel.

[73]

Q. By Mr. Victor Cogen: At that time you knew that Ivan Polakof was the owner, didn't you?

Mr. Hindin: Just a minute. I object to that as calling for a conclusion of the witness.

The Court: If he knows he can answer the question. Answer yes or no.

A. What was the question, please?

Q. By Mr. Victor Cogen: At the time you went up to the Title Company with me you knew that Ivan Polakof was the owner, did you not?

A. No, I did not. I asked about that and Mr. Sam Polakof told me that the title would have to be placed in Marvin Polakof's name on account of this business condition.

(Testimony of E. K. Albright.)

Mr. Victor Cogen: I object to that on the ground it is hearsay.

Mr. Hindin: I think it is very material.

Mr. Victor Cogen: There is no showing what parties were present, or anything else.

The Court: It is hearsay. You invited it, though.

Mr. Victor Cogen: I know it, your Honor.

The Court: Proceed.

The Witness: When Mr. Marvin Polakof——

Mr. Victor Cogen: Just a minute.

The Court: You have answered the question.

Mr. Hindin: There is no question now.

The Court: Proceed with your question. [74]

Q. By Mr. Victor Cogen: Mr. Albright, in 1935 this property was purchased, wasn't it?

A. Yes, sir.

Q. Did you handle the title? A. Yes, sir.

Q. In whose name was the title taken?

A. Marvin Polakof's.

Q. Then you had a deal in 1936? A. Yes.

Q. Then you had Sam Polakof as the owner?

A. I have a receipt saying, "Agent for Marvin Polakof."

Q. Do you have that receipt here?

A. A copy of it.

Mr. Hindin: May we see that?

The Witness: Yes.

Q. By Mr. Victor Cogen: Has this receipt ever been signed? A. Yes, sir.

(Testimony of E. K. Albright.)

Q. Was Mr. Ivan Polakof present at the time?

A. No, sir.

The Court: What are you talking about?

Mr. Victor Cogen: Some sort of a receipt. A blank receipt.

Q. Was Marvin Polakof present?

A. No; not when I gave him the check.

Q. I am asking you at the time you say a purported [75] receipt was signed. Do you have the original of that receipt? A. No.

Q. Where is the original of that receipt?

A. I haven't got it.

Q. Do you know where it is?

A. I gave it to the True-X Chemical Company.

Q. Do you know whether they still have it?

A. That I don't know.

Q. Was there only one original receipt?

A. Yes.

Q. And that, as far as you know, is in the possession of the True-X Chemical Company?

A. Yes.

Q. These dealings that you had were with Sam Polakof, weren't they? A. Yes, sir.

Q. Do you know Ivan Polakof?

A. Yes, sir.

Q. Did you have any dealings with him?

A. Yes.

Q. With reference to this property?

A. Yes, sir.

(Testimony of E. K. Albright.)

Q. When did you first talk to him?

A. Right after I sold the property to Mr. Polakof through the bankruptcy court. [76]

Q. Did you have any dealings with him in August, 1937?

A. I can't say definitely as to that particular date. Our dealings extended over a period of three or four years, nearly constantly, monthly.

The Court: What was the nature of your dealings with him?

A. Mr. Ivan Polakof became the record owner. Mr. Marvin Polakof intended to get married. He came to my office and asked us what he should do; that Marvin Polakof intended to get married and I told him it was better to have the property in his name; that you can't tell what is going to happen in a marital relation, and it would be better to have that property in Ivan Polakof's name, he being a single man. That was then done.

The Court: Who was present when that conversation took place?

A. No one. He came to my office.

The Court: Who did?

A. Mr. Ivan Polakof.

The Court: Why did you suggest putting it in his name?

A. Well, we discussed that. I suggested it for the reason that Marvin intended to get married, and he was apprehensive as to what was apt to hap-

(Testimony of E. K. Albright.)

pen, and they wanted to keep that property intact in their own family.

The Court: Who told you that?

A. Ivan Polakof. [77]

The Court: Gentlemen, we can't finish before noon. We will take a recess at this time until 2 o'clock.

Mr. Hindin: Your Honor, would you care to instruct the defendant, Marvin Polakof, to return this afternoon?

The Court: All witnesses present here are directed to return at 2 o'clock.

(An adjournment was taken until 2 o'clock p. m. of this same day.) [78]

Afternoon Session

2:00 O'clock.

E. K. ALBRIGHT

Recalled.

Cross Examination resumed.

The Court: Proceed, gentlemen.

Q. By Mr. Victor Cogen: Mr. Albright, I just want to clear up one statement you made. When Ivan came to see you in reference to that property he made a statement to you that Mr. Marvin Polakof was about to be married——

A. Yes, sir.

Q. Or going to get married?

A. Yes, sir.

(Testimony of E. K. Albright.)

Q. A deed was drawn then? A. Yes.

Q. Did you prepare it?

A. I did; yes, sir.

Q. And that deed was a transfer of property from Marvin to Ivan? A. Yes, sir.

Q. Do you recall about what date that was?

A. No, I don't. I know I notarized that. The recordings are in another court, and I am unable to ascertain the date.

The Court: Wasn't that deed executed as of that date?

Mr. Victor Cogen: Yes. I just want to call attention [79] to the dates. I have the original deed, so we can use that instead of the photostatic copy.

Q. Mr. Albright, I have a deed, which is the same as Plaintiff's Exhibit 3. This is the original deed, and I note the date is the 26th day of August, 1937. Would you say that was about the date that Mr. Ivan Polakof came to you and talked to you about the fact that Mr. Marvin Polakof was getting married and he wanted to have the property transferred from Marvin to himself to avoid any complications with Marvin's future wife?

A. That not being my writing over here, I am somewhat in doubt—I did not write this here.

Q. Is this the deed that you prepared?

A. Yes, sir.

Q. I will ask you to look on the reverse side thereof. You will notice that there is a notary acknowledgment? A. Yes.

(Testimony of E. K. Albright.)

Q. In Nebraska, in the County of Douglas, on the 26th day of August, 1937, Marvin Polakof appeared before this notary, Mr. Darner, I think, that is—as close as I can get to it. Does that fix the time in your mind as to the date on which Ivan talked to you? A. Yes; that is the time.

Q. You know, of course, that Marvin married in the early part of 1938?

Mr. Hindin: If you know. [80]

A. That I don't know. The only way I can fix the date, at that time in 1937 I just moved in my new house in June, and the transaction took place in my new house.

Q. By Mr. Victor Cogen: That would be approximately in June, 1937?

A. In June I moved in my new house.

The Court: It would be after June?

A. In June, 1937, I moved into my new house, and the transaction took place in my new house. Therefore, I fix the date about June, 1937.

Q. By Mr. Victor Cogen: Ivan told you at that time he wanted the property transferred so there would be no complications with Marvin's future wife? A. That is correct.

Q. And when they were married he didn't want anything to happen to affect the ownership of the property by reason of the marriage? A. Yes.

Mr. Victor Cogen: That is all. May we have this exhibit for identification?

(Testimony of E. K. Albright.)

Mr. Hindin: We have a certified copy of the document already in the record, counsel.

Mr. Victor Cogen: Well, I am satisfied, if counsel is, that it is a certified copy of the original.

Mr. Hindin: Yes. Counsel, there are one or two more questions I want to ask him, but before I do that I want to [81] offer this certified copy of a power of attorney given from Marvin Polakof to Sam Polakof.

The Clerk: Plaintiff's Exhibit 4.

PLAINTIFF'S EXHIBIT 4

Book 14312 Page 122 Official Records

Power of Attorney General

Know All Men by These Presents: That I, Marvin Polakof residing at 2231 Branden St., in the City of Los Angeles, County of Los Angeles, and in State of California, have made, constituted, and appointed, and by these presents do make, constitute and appoint Sam Polakof residing at 2231 Branden St., in the City of Los Angeles, County of Los Angeles, State of California, my true and lawful Attorney for me and in my name, place, and stead, and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me and have, use and take all lawful ways and means in my name or other-

(Testimony of E. K. Albright.)

wise for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for the same and acquittances or other sufficient discharges for the same for me and in my name, to make seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizin and possession of all lands, and all deeds and other assurances, in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements, and hereditaments, upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make do, and transact all and every kind of business of what nature or kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises. Giving and Granting unto

(Testimony of E. K. Albright.)

my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present hereby ratifying all that my said Attorney Sam Polakof shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal the 18th day of July, nineteen hundred and 36.

MARVIN POLAKOF

State of California,
County of Los Angeles—ss.

On this 18th day of July, A. D., 1936, before me, C. R. Pearman, a Notary Public in and for said County and State, personally appeared Marvin Polakof, known to me, (or proved to me on the oath of—) to be the person whose name—subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal)

C. R. PEARMAN.

Notary Public in and for said County and State.

Notary Public in and for the County of Los Angeles, State of California.

(Testimony of E. K. Albright.)

#974. Copy of original recorded at request of Appointee, July 29, 1936, 1:21 PM. Copyist #114. Compared. C. L. Logan, County Recorder, By S. D. Terry 8 Deputy
\$1.00-6 s.

Mr. Hindin: Also, I would like to file this subpoena and return thereof for the True-X Chemical Company.

Mr. Victor Cogen: Counsel, if you will state the purpose to the court I may not object to the introduction of it.

Mr. Hindin: The purpose, if the court please, is to lay a foundation for the introduction of secondary evidence, namely, a receipt.

Mr. Victor Cogen: If the court please, I am going to object to that as a pure conclusion of the marshal, Mr. Clark, by his deputy, as receiving a subpoena on the 14th day of October, 1941—that is the date, isn't it?

Mr. Hindin: Yes.

Mr. Victor Cogen: And that he has checked the city and telephone directory and can't find them. I submit, your Honor, that it should not be permitted to be introduced for any purpose.

Mr. Hindin: It is a matter of official record, your Honor.

The Court: That will be filed. It isn't much foundation, counsel. I know how easy it is to get this.

(Testimony of E. K. Albright.)

Redirect Examination

Q. By Mr. Hindin: Now, one or two more questions, [82] Mr. Albright. You testified that you had a conversation with Mr. Sam Polakof with reference to this property; is that correct?

A. I had several conversations.

Q. With Mr. Sam Polakof?

A. Yes. Nearly all of them.

Q. Did Mr. Sam Polakof tell you that he held a power of attorney from Marvin Polakof to act for that property?

Mr. Victor Cogen: If your Honor please, that is objected to as hearsay.

The Court: Objection sustained.

Q. By Mr. Hindin: Did either Marvin Polakof or Sam Polakof show you a power of attorney from Marvin to Sam?

Mr. Victor Cogen: I object to that on the ground that it is a double question, your Honor.

The Court: It is a technical objection. Overruled.

Mr. Victor Cogen: What Sam Polakof did is one thing. What Marvin Polakof did is entirely another matter. And one objection would be good; the other wouldn't.

The Court: I will overrule the objection.

Mr. Hindin: Will you repeat the question?

(Question read by reporter.)

The Court: Do you know anything about a power of attorney that Sam had?

(Testimony of E. K. Albright.)

A. Yes, sir.

Q. By the Court: From whom did you learn that? [83]

A. I bought a water stock from the—this company had no water stock and I negotiated a deal for the purchase of the water stock. He gave me a check first, then I took the rest of the money from the rental of the property and applied it on the purchase of the water stock and issued it to him. It was to be issued to——

The Court: Who was that?

A. Our water company. The secretary of the water company said——

The Court: We don't care what they told you; but did you talk to Marvin about that?

A. No, I didn't.

The Court: Who did you talk to?

A. To Mr. Ivan and to Mr. Polakof. Mr. Polakof told me he has a power——

The Court: Wait a minute. That is Sam?

A. That is Sam, yes.

The Court: Did you talk to Ivan?

A. I talked to Ivan.

The Court: What was the conversation with Ivan about?

A. The issue, again, of the water stock came up, and I asked to whom to make that water stock out. He said to make it—I said, "Shall I make it out to Sam Polakof or Marvin Polakof?" He said,

(Testimony of E. K. Albright.)

“It doesn’t matter, because my father has the power of attorney from Marvin.” And when Mr. Polakof came in I asked him about that. [84]

The Court: We don’t care about that. That is Sam?

A. Sam, yes. But I knew there was a power of attorney.

Mr. Hindin: Your Honor, I want to call this fact to your Honor’s attention: That here we have a document of record whereby Sam Polakof is given a power of attorney to act as attorney in fact for Marvin Polakof with reference to this property. Any acts or statements made by Sam Polakof with reference to and under this power of attorney, I submit under the authorities they are binding as an admission against interest, against this defendant, Marvin Polakof.

The Court: I will be glad to listen to your authorities.

Mr. Victor Cogen: I have the stock here. It is made out to Ivan Polakof, as of October 11, 1937. If they want to go into that and show that he received instructions to put it in Ivan’s name, I am perfectly willing, because it substantiates our statement.

The Court: Proceed.

Mr. Hindin: That isn’t the purpose, at all.

Q. Let me ask you this, Mr. Albright: After Marvin got this property you negotiated this lease,

(Testimony of E. K. Albright.)

that you testified to this morning, to the True-X Chemical Company; is that correct?

A. Yes, sir.

Q. Now, did the True-X Chemical Company ever take [85] possession of that property?

A. Yes, sir.

Q. How long were they in that property?

A. About a year and a half.

Q. Are they in business now, do you know?

A. They are not in business now.

Q. When did they go out of business?

A. In the fall of 1938.

Q. Did you know the members of that business?

A. Yes, sir.

Q. Are they available in Los Angeles County now?

A. I know the address of one; Mr. Newhouse; he is in Glendale. But I just looked at my memorandum. I haven't got it here. I have it in my office.

Q. But the True-X Chemical Company has been out of business since 1938?

A. Yes, sir.

Q. This receipt that you identified this morning, do you have that with you now?

A. You mean a copy of that receipt?

Q. Yes. A. Yes.

Q. Thank you. There was an original of that receipt made, was there not? A. Yes, sir.

(Testimony of E. K. Albright.)

Q. Was that original made at the same time that this [86] copy was made?

A. Yes. I made it.

Q. Was it made by the same stroke of the typewriter keys?

A. Yes; I had a carbon there and typed it.

Q. And the original and this copy were made at one and the same time? A. Yes.

The Court: One is a carbon copy of the other?

A. Yes, sir.

Q. By Mr. Hindin: What became of the original of that?

The Court: He testified he delivered it to the chemical company.

Mr. Hindin: That is right.

Q. Was the original signed in your presence?

A. Yes, sir.

Q. By whom? A. By Mr. Sam Polakof.

Mr. Victor Cogen: Pardon me, your Honor. I would like to enter an objection. I object to it on the ground that it isn't the best evidence. The original document is the best evidence, and there has been no showing——

Mr. Hindin: I haven't offered this in evidence.

Mr. Victor Cogen: You are asking the question. And the evidence indicates that the True-X Chemical Company had a representative in Mr. Newhouse. [87]

The Court: Gentlemen, are we going to get down to facts?

(Testimony of E. K. Albright.)

Mr. Victor Cogen: I want to get down to facts as soon as possible, your Honor.

The Court: Do you deny that Sam-Polakof signed this receipt?

Mr. Victor Cogen: I have never seen the original or have I ever seen the copy.

The Court: Have you reason to deny it? This man was acting as agent for the whole group, wasn't he?

Mr. Victor Cogen: I couldn't say.

The Court: He was acting as agent for somebody there.

Mr. Victor Cogen: He was acting as agent for somebody there, but I couldn't say for all the family.

The Court: But there are three members of the family.

Mr. Victor Cogen: That is right.

The Court: And he was acting as agent for the property, to find them a tenant.

Mr. Victor Cogen: Without indicating who he was acting for.

The Court: Well, I want to find out pretty soon. Try to do that.

Mr. Victor Cogen: Yes.

Q. By Mr. Hindin: I say, Mr. Sam Polakof signed that in your presence; is that correct?

A. Yes. When the check was brought into my office. [88] Mr. Newhouse—

(Testimony of E. K. Albright.)

The Court: I don't think it proves anything, one way or the other.

Mr. Hindin: I will offer this in evidence as secondary evidence. The foundation having been laid that it is impossible to produce the original.

Mr. Victor Cogen: We object to it on the ground that it isn't the best evidence.

The Court: I think there is sufficient foundation, but I can't see whether or not it is very material. In a case like this you generally let evidence in and see what you have got when you get through.

The Clerk: Exhibit 5.

PLAINTIFF'S EXHIBIT 5

May 10, 1938.

Received from Mr. H. C. Kendall, Mr. C. E. Crosby, and Mr. Frank Newhouse, Check for the amount of \$189.69 (One-Hundred-Eighty-Nine) Dollars and 69 cents as payment for the rental for the Factory Building, located on Corner 4th, Street and French Av, County of Los Angeles.

The Rentel is for the period of from the first day of April. to the first day of June, 1938, comprising the Sum of \$120.00. The difference of the \$120.00 and the amount of the Check \$189.69, is for the payment of the Taxes which the Tennants are paying under the term of the Lease.

Agent for Mr. Marvin Polacoff

(Testimony of E. K. Albright.)

Q. By Mr. Hindin: Mr. Albright, are you familiar with the assessed valuation of that property.

A. Yes, sir.

Q. Do you have the original tax bills for the year 1938 in your possession for that property?

A. Just one.

Q. Just one. For the year 1938?

A. 1938-1939.

Q. For 1938-1939. How did you come in possession of that tax bill?

A. I paid the taxes for the property.

Q. You did?

A. Yes. The True-X Chemical Company would give me a [89] check and I paid the taxes.

Q. That was during the period of their tenancy?

A. Yes, sir.

Mr. Hindin: I offer this in evidence.

The Court: What does it show the assessed valuation? That is the only thing we are interested in.

Mr. Hindin: It shows the assessed valuation at \$4,600.

Q. Is that correct? A. Yes.

The Court: How much is the real estate?

Mr. Hindin: The real estate \$660; improvements \$3,940; total \$4,600. Do I take it from your Honor's statement——

The Court: I don't think it is necessary to introduce it in evidence, unless counsel wants it.

Mr. Victor Cogen: I don't see any particular reason for it.

(Testimony of E. K. Albright.)

Q. By Mr. Hindin: To whom is that property assessed as the legal owner?

Mr. Victor Cogen: We object to that, your Honor.

The Court: That isn't evidence of the record title, counsel. We have the legal title before us; the deeds.

Mr. Hindin: That is all.

The Court: Mr. Albright, you originally owned this property, as I understand?

A. No, your Honor. I just built the building. I am a subdivider by profession, and I took a large area of [90] property and built four factories there for the purpose of starting building that thing up, and one of the factories was on this Polakof property, which was built for the California Law Publishing Company. When the Mortgage Realty Company became insolvent then I bought this property in court for Mr. Polakof and Mr. Fratkin.

The Court: You bought it——

A. In the bankruptcy court.

The Court: You bought it in the bankruptcy court for these two men? A. Yes.

The Court: Did you handle the whole transaction? A. Yes, sir.

The Court: Did you handle the money?

A. Yes, sir.

The Court: From whom did you get the money?

A. From Mr. Fratkin and Mr. Polakof. These two were partners. They bought the property orig-

(Testimony of E. K. Albright.)

inally for \$2,650. Mr. Polakof and Mr. Fratkin became partners.

The Court: Each put up half the money?

A. Each put up half the money.

The Court: You bought the property at that time, and, as I understand, it was vacant then for about eight months? A. About a year.

The Court: Then you rented it to the chemical company?

A. I leased it to the chemical company. [91]

The Court: And this receipt you are talking about was for the first payment of the rent?

A. That was the last payment of the rent. They just put up \$300. They took an option to purchase the property for \$6,500.

The Court: They put up \$300 cash?

A. Yes, sir.

The Court: What did you do with that \$300?

A. I gave it to Sam Polakof.

The Court: You gave it to Sam Polakof?

A. Sam Polakof. Including rent and option money.

The Court: All the rent you collected you gave to Mr. Sam Polakof?

A. To Mr. Sam Polakof, yes, sir.

The Court: Did you ever have any transaction with reference to this property with Marvin?

A. No, sir.

The Court: Did Marvin ever talk to you about the property?

(Testimony of E. K. Albright.)

A. Yes. He came over to visit us once in a while. They were building boats after the boat plant moved in, and Mr. Polakof built two boats over there for his own account. And they came over, usually Sundays, and visited. Marvin came over there with his wife and I met Mr. Marvin Polakof. After that I needed some variance in zoning—wanted to change the zoning ordinance, and I met Mr. Marvin [92] there. That was about the only business I had with Marvin.

The Court: With reference to this original deed, did this other party transfer to Marvin?

Mr. Hindin: Which party, Fratkin?

The Court: Yes.

Mr. Hindin: Yes.

Mr. Victor Cogen: In 1936, wasn't it?

Mr. Hindin: I don't know.

The Court: Did you know Mr. Fratkin sold the property to Marvin?

A. Yes, sir. Mr. Fratkin came over and consulted me about it.

The Court: Who told you to put it in the name of Marvin? A. Mr. Sam Polakof.

The Court: Was anything said at that time as to where the money was coming from?

A. Your Honor, I don't understand. Which money? The money that came from where?

The Court: The money that Sam Polakof put up. Did he tell you where the money came from?

(Testimony of E. K. Albright.)

A. No; he didn't say. He **hypothecated**—made a loan. The first original price was \$2,650. Mr. Fratkin put one-half; then Mr. Polakof put up \$500; then Mr. Polakof signed a mortgage for \$1,000 payable to Mr. Fratkin. That was the total purchase price. Then after, Fratkin wasn't satisfied [93] because he couldn't lease this building right away; and then he sold his interest to Mr. Polakof and then he became the sole owner—Mr. Marvin Polakof then became the sole owner.

The Court: As far as you know, then, Marvin has never exercised any supervision over the property himself, has he? A. Never.

The Court: As far as you know it has always been Sam? A. Sam Polakof.

The Court: What have you known about Ivan being in the picture?

A. Ivan was more active. Ivan was always more active. My negotiations was nearly always with Ivan when Sam Polakof wasn't around. He was more active than Marvin.

The Court: How did you come to have the water stock in Ivan's name?

A. The water rental was delinquent and I couldn't get any money from anyone to pay the water money, so I took Ivan over to the president of the water company and he promised to pay the water. It would be, then, about \$65 in arrears on the water payment. So I took Ivan over to the water president; he had ordered me to shut the

(Testimony of E. K. Albright.)

water off; and Ivan promised to give me \$32.50 and to give me another \$32.50 right away. That was three years ago. I haven't got it yet. When I bought the water stock Mr. Sam Polakof gave me \$50, then I prepared the assignment of the rental [94] of the building to Mrs. Kenney, the owner of the water stock, and I authorized Mrs. Kenney to issue the water stock when the total sum of \$400 had been paid, at which time the secretary was authorized to make a certificate to Mr. Ivan Polakof, because that was the man that owed for the water bill, and Ivan Polakof paid this \$32.50. There wasn't any reference at all as to whom to make it out to, so he said to make it out to Mr. Ivan Polakof.

The Court: Who said?

A. Mr. Sam Polakof.

The Court: Then, as I understand, Sam and Ivan have been the active ones in this property?

A. Yes.

The Court: And Marvin has not been taking an active part? A. No.

The Court: When was this conversation that you had with Ivan concerning the transfer of the property to him?

A. That was prior to the marriage of Marvin.

The Court: Who was present at that time?

A. Only Mr. Ivan. Mr. Ivan Polakof and myself.

The Court: How did you come to be discussing it?

(Testimony of E. K. Albright.)

A. We were very friendly. Sam Polakof was a very good friend of mine and we were rather very close friends, and whatever came up—he discussed a lot of personal matters with me, and private matters, construction and [95] building and lease, and so on, and whenever he had any difficulty then he came to me. If he wanted to borrow money and make a loan then I endeavored to hypothecate the property if I could. And we became rather chummy. Very often he brought to me letters which he read to me, telling me his difficulties, and that was one of the reasons we were very close. The change in the property occurred when Ivan came over and told me his brother was apt to get married and he was apprehensive as to the marital difficulties which might arise. So then I suggested that they deed this property to Ivan from Marvin.

The Court: Was anything said at that time as to who owned the property?

A. We knew who owned the property. That did not have to be discussed. We knew it was Sam Polakof and we didn't have to discuss that. We knew the true picture.

The Court: But you knew it was in Marvin's name? A. Yes.

The Court: Then you didn't know who actually owned the property?

A. Except from the record.

The Court: All you knew was who was the record owner?

(Testimony of E. K. Albright.)

A. The record owner; that is right.

The Court: Was there any discussion at that time in which Ivan made any comment about, "I have money in that property", or something to that effect? [96]

A. No, he did not.

The Court: Or, "My father has some money in it"?

A. No; he did not say that. He took it for granted I knew the situation.

The Court: You didn't know whose money went originally into it?

A. Mr. Sam Polakof. He had it.

The Court: But you don't know whether Mr. Marvin Polakof has any money in the property or not?

A. No.

Recross Examination

Q. By Mr. Victor Cogen: Mr. Albright, this stock counsel didn't want to ask you about, do you know what this is?

A. Yes, sir.

Q. Just tell the court, because I don't want it introduced in evidence.

The Court: He has already testified it is a certificate of water stock.

Mr. Victor Cogen: Yes.

The Court: What is the date of it?

Mr. Victor Cogen: October 11, 1937.

Q. Mr. Albright, this deed that was made from Marvin to Ivan was about June or July or August.

(Testimony of E. K. Albright.)

1937, transferring the property from Marvin to Ivan; isn't that right? A. Yes, sir. [97]

Q. And isn't that the reason why the stock, which was issued about a month or two after the transfer was made in 1937, was issued in Ivan's name, because he was the owner of the stock and the stock had to run with the land; isn't that right?

A. That is right.

Q. And that is why it was made in Ivan's name?

A. Yes.

The Court: Any further questions?

Mr. Victor Cogen: No further questions.

Mr. Hindin: I would like to make a motion to strike that last, on the ground that it calls for a conclusion of the witness.

Mr. Victor Cogen: I think it is merely clarifying what he said before.

The Court: Does the stock certificate itself show the purpose?

Mr. Victor Cogen: I will read it to your Honor.

The Court: Let me see it.

Mr. Hindin: The last three questions, your Honor, have gone to the question of who was the owner. That may or may not reveal it, and the question is one that calls for a conclusion of the witness.

(Testimony of E. K. Albright.)

The Court: Well, why don't you introduce that stock certificate, and you can withdraw it by substituting a photostatic copy. [98]

Mr. Victor Cogen: I will be glad to.

Mr. Hindin: To which we object on the ground that no proper foundation has been laid, and I move to strike the answer of the witness to the last three questions on the ground that they call for and are conclusions.

The Court: Well, the stock certificate shows it is pertinent to this, so I am going to deny the motion. This stock certificate corrects any conclusion. It may be introduced in evidence.

The Clerk: Defendants' Exhibit A.

Defendant's exhibit A is a Stock Certificate #42 for five shares of Connemara Mutual Water Co., issued to Ivan Polakof dated October 11, 1937.

Mr. Victor Cogen: That is all, Mr. Albright.

Mr. Hindin: May we have a stipulation, counsel, that Mr. Sam Polakof died in the interim?

Mr. Victor Cogen: I think he died some time in June or July, 1940—May 3, 1940.

Mr. Hindin: May we have a stipulation that Mr. Sam Polakof died May 3, 1940?

Mr. Victor Cogen: Yes.

Mr. Hindin: At this time I would like to offer a certificate of the county clerk.

The Court: What is it?

(Testimony of E. K. Albright.)

Mr. Hindin: A certificate by the county clerk of Los Angeles County that there has been no probate of the estate of Sam Polakof.

Mr. Victor Cogen: I might say there was no estate, so there could be no probate. There have been no papers filed [99] for the probate of the estate of Sam Polakof.

Mr. Hindin: Counsel, may we have a stipulation that Mr. Gustave Goldstein is the duly elected, qualified and acting trustee in bankruptcy, and may we also have a stipulation that there are now not sufficient funds in the hands of the trustee in bankruptcy to pay the claims of the creditors who have filed and proven claims?

Mr. Victor Cogen: Yes; we will so stipulate.

Mr. Hindin: That is, in the bankruptcy case of Marvin Polakof, doing business as Ace Distributing Company?

Mr. Victor Cogen: That is correct.

Mr. Hindin: So stipulated?

Mr. Victor Cogen: So stipulate.

Mr. Hindin: Now, your Honor, we have in our possession the two documents that——

The Court: May I see them?

Mr. Hindin: We would like to offer them in evidence when the proper time comes——

Mr. Victor Cogen: I am going to object to the introduction——

Mr. Hindin: Wait a minute. Mr. Graeber was on the stand, subject to cross examination by yourself. [100]

H. E. GRAEBER, recalled.

Cross Examination

Resumed.

Q. By Mr. Victor Cogen: Mr. Graeber, do you have any statement, or were there ever any statements issued to the Acampo Winery as a basis for credit established by Marvin Polakof, when Mr. Marvin Polakof first started doing business with the Acampo Winery?

A. I don't know that.

Q. Have you checked the records to see whether there are any statements in the files of the Acampo Winery?

A. Yes, sir.

Q. Outside of this one statement that the Judge is reading now, have you been able to find any other statements?

A. Do you mean statements given us by Mr. Polakof?

Q. Yes. A. No. That is the only one.

Q. That is the only one. You did a business of about \$5,000 a month with Mr. Polakof?

A. That is right.

Q. And you did not receive any financial statements from him in the year 1935, 1936, 1937, 1938 or 1939?

A. No. At least none that are on file in our office at present.

Q. Then, when you did give Marvin Polakof credit you did not do it on the basis of a written statement showing the ownership of the property out in Baldwin Park? [101]

(Testimony of H. E. Graeber.)

A. I don't believe I am in a position to answer that question, because I didn't pass on the credit of that account. It was done by other officers of the corporation.

Q. Do you know the name of the licensee with whom your firm was doing business; that is, the licensee of Ace Distributing Company?

A. All I know is that our invoices were made to the Ace Distributing Company.

Q. Under the State law of California it is necessary when you sell liquor from a winery to a wholesaler you have to sell it only to a licensee?

Mr. Hindin: Just a second. Is that a question or a statement?

Mr. Victor Cogen: I am asking if he knows that as a fact.

A. From personal knowledge, no.

Mr. Hindin: I object to that as calling for a conclusion of the witness. If it is a matter of State law, that is what it is. The court would take judicial notice of that fact, if that is the fact.

The Court: But sometimes we are supposed to take judicial notice of State laws we don't know anything about.

Mr. Victor Cogen: Will counsel stipulate that that is a law of the State of California, that liquor can only be sold by wineries to an authorized licensed wholesaler?

Mr. Hindin: Or his representative. We will so [102] stipulate.

(Testimony of H. E. Graeber.)

Mr. Victor Cogen: What is the representative? I don't understand that.

Mr. Hindin: They can sell it to a man licensed to purchase the liquor, or his authorized representative.

Mr. Victor Cogen: I don't know about the authorized representative. I know you can sell it to the authorized licensee.

Q. Did you know in whose name the license was taken for the Ace Distributing Company?

A. I have heard it. From personal knowledge I don't know. In other words, I never saw the license, but I understood——

The Court: You will have to speak a little louder. I can't hear you.

A. I understood it was in the name of Mr. Marvin Polakof.

Q. By Mr. Victor Cogen: Marvin Polakof was a licensee? A. Yes.

Q. Doing business as the Ace Distributing Company?

A. That is the way it was understood; yes.

Q. In June, 1940, there was indebtedness from the Ace Distributing Company to the Acampo Winery and there was a little difficulty at that time, wasn't there? A. Yes.

Q. Mr. Bokofsky became associated with the Ace [103] Distributing Company: is that correct?

A. That is right.

(Testimony of H. E. Graeber.)

Q. And there was an agreement made between Mr. Bokofsy and the Acampo Winery in reference to the indebtedness of the Ace Distributing Company, wasn't there?

Mr. Hindin: Just a second. We will object to that on the ground that there is no proper foundation laid, in that there is no showing what these agreements are supposed to have contained or who made them, or whether they were written or oral.

Mr. Victor Cogen: I may state for counsel's benefit that it is an agreement made some time in June or July, 1940. Is the agreement there?

Mr. Hindin: Is this the one?

Mr. Victor Cogen: That may not be the only agreement. There were two or three agreements, as I understand.

The Court: I am a stickler for the best evidence.

Mr. Victor Cogen: All right. I will be glad to do it, your Honor.

Q. Have you ever seen this instrument before?

A. Yes, sir.

Q. Who were the parties to it?

A. Acampo Winery and Mr. Bokofsy.

Q. Yes. The items referred to in that, the indebtedness of the Ace Distributing Company as of this particular date—— [104]

A. It refers——

Q. —of August, 1940?

A. The agreement does not mention the indebtedness. It refers to it.

(Testimony of H. E. Graeber.)

Q. It refers to the indebtedness?

A. It does not mention the amount. Yes; it refers to it.

Q. At that time the Acampo Winery took 12 notes from the Ace Distributing Company amounting to approximately \$6,000; isn't that correct?

A. Trade acceptances.

Q. Trade acceptances? A. Yes, sir.

Q. And those trade acceptances were guaranteed by Percy Bokofsy?

A. Well, they were signed by him. I don't know whether——

Q. Do you have the originals here?

A. Aren't they attached to the claim?

Q. I don't know.

Mr. Hindin: Some of them are attached to the claim.

The Witness: I do not have them.

Q. By Mr. Victor Cogen: Are these the photostatic copies of the trade acceptances that are referred to in this agreement of August 14, 1940, that I have just been asking you about?

A. Some of them are. Let's see. They are the [105] balances of—here is one. These are the photostatic copies of trade acceptances representing the balance due from Ace. I don't find any of those \$500 ones. Here they are. Yes; these are the ones. That is correct.

Mr. Victor Cogen: Counsel, is it all right to refer to these photostatic copies, instead of the originals?

(Testimony of H. E. Graeber.)

Mr. Hindin: Yes. For the purpose of identification, those are the photostatic copies referred to or attached to the claims of the Acampo Winery which have heretofore been filed in the bankruptcy court and which have been offered by reference this morning.

Q. By Mr. Victor Cogen: When these trade acceptances were received they were taken in accordance with this agreement that I have just referred to, the one that is in front of you?

A. Yes.

Q. Thereafter some of these trade acceptances were paid, weren't they? A. Yes.

Q. You received \$2,000 in toto?

A. Yes; for trade acceptances.

Q. For trade acceptances. There is an indebtedness owing from the defendants. That referred to the indebtedness prior to April, 1939?

A. Yes.

Q. And \$2,000 would be more than sufficient to pay that? [106]

The Court: That is a conclusion.

Mr. Victor Cogen: Well, I will ask it another way.

The Court: You don't have to ask the question if \$2,000 will pay a \$1,000 bill.

Mr. Victor Cogen: All right, your Honor.

Q. Did you receive instructions from Mr. Marvin Polakof to apply the two thousand dollars to the indebtedness after April 24, 1939?

(Testimony of H. E. Graeber.)

A. No, sir.

Q. You merely applied it on the account; is that correct? A. Yes.

Q. Do you have the running account, the original ledger sheet or a copy of your ledger sheet?

A. Of their account?

Q. Yes.

A. The Ace account. Yes, sir.

Q. May I see that?

A. This is the accounts receivable. This is the trade acceptance record.

Q. In referring to these documents did they state how much merchandise was bought by the Ace Distributing Company from July 1st?

The Court: Where is that running account?

A. These are the accounts receivable and these are the trade acceptances.

The Court: That is the trade acceptance? [107]

A. Yes.

The Court: The trade acceptances cover the—

A. Perhaps I should explain.

The Court: The trade acceptances simply cover the items that are in here?

A. Yes. In other words, when a trade acceptance is received the account is credited and the trade acceptance record is set up.

The Court: Is that what this balance refers to?

A. That is right. That is in the open account.

The Court: And the trade acceptances are trade acceptances to cover that item, or should be?

(Testimony of H. E. Graeber.)

A. This would be in addition to the trade acceptance balance.

The Court: In addition?

A. As of July 1st there were trade acceptances not executed, but that figure there, the balance of the indebtedness, was made up by the balance of the trade acceptances shown outstanding.

The Court: All right. Proceed.

Q. By Mr. Victor Cogen: For the purpose of the record and to avoid putting all these documents in the record, what is your balance on the open account of the Ace Distributing Company as of the end of 1940?

A. It was \$217.51.

Q. Prior to or subsequent to April? For what period of [108] time is this \$217.51 unpaid?

A. I think that represents a coooperage balance. It couldn't have been much more than 90 or 120 days, perhaps.

Q. That would be for moneys owed at least during the year 1940; not before that? A. Yes.

Q. You have a trade acceptance ledger. Maybe I had better ask you during the recess what that represents.

Mr. Hindin: May I take the witness over. I think I can clear that up very quickly.

Q. By Mr. Victor Cogen: What is this 8471?

A. Well, the amount owed as of November 8th was \$8,471.29. It shows November 8, 1940 here.

(Testimony of H. E. Graeber.)

Q. What is the earliest trade acceptance for which this amount represents unpaid——

A. I think it was one of those issued on the bottled wine, which would be about November, 1938, if I am not mistaken.

Q. Can you trace that? A. Yes.

The Court: It doesn't do much good to the court just to talk among yourselves over there.

Mr. Victor Cogen: We had better stand away from the witness.

Redirect Examination

Q. By Mr. Hindin: I am calling attention to the trade [109] acceptance ledger sheets. Will you indicate from this trade acceptance ledger sheet when these first unpaid trade acceptances were given, that you now hold? Does it appear in this ledger?

A. Yes, it appears in this ledger, but in order to pick it out I would have to have the list of outstanding items, so I could show it to you in here. I think it was \$868.40. If my memory serves me right, these two trade acceptances were both outstanding.

Q. These both were outstanding in January, 1939, and were unpaid as of April 24, 1939?

A. Beg Pardon. They were given us in January, 1940.

Q. I see.

A. But it was for a purchase that was made in 1938.

(Testimony of H. E. Graeber.)

Q. I see. In other words, it was unpaid—

The Court: Were there renewals of old trade acceptances?

A. No, sir. This is a deal on some bottled wine, which Ace Distributing Company had in their inventory for a long time before they gave us negotiable documents as settlement. In other words, the wine moved in there in 1938 and we didn't receive a trade acceptance covering it until 1940.

Q. By Mr. Hindin: In other words, then, as of April 24, 1939, there was an account payable on these particular items of \$568.40; is that correct?

The Court: That isn't a fair statement, counsel. He said they were taking trade acceptances and they were [110] using those in lieu of the accounts, so the indebtedness was then on the trade acceptance.

Mr. Hindin: But they hadn't gotten those until 1940.

Mr. Victor Cogen: Well, they took them in 1940.

Q. By Mr. Hindin: Here is the only question I want to make clear: As of April 24, 1939, what was the condition; you did not have trade acceptances yet due?

A. It was carried as an open account at that time.

Q. And that open account was unpaid at that date? A. Yes, sir.

Q. Are there any other items from that record that would indicate any other items that were unpaid as of April 24, 1939?

(Testimony of H. E. Graeber.)

A. I would have to have our claims so that I could find the dates of those outstanding acceptances.

Q. All right. We will try to get them for you here. After you accepted trade acceptances, until those trade acceptances were paid, there still was an unpaid balance due you, wasn't there?

Mr. Victor Cogen: Just a minute. I think the court can understand what the witness has already said; they accepted the trade acceptances and canceled out the open account.

Mr. Hindin: But then there was an unpaid balance on the trade acceptances.

The Court: His testimony was that they were accepting [111] negotiable instruments and were transferring it.

Mr. Victor Cogen: Yes; and discounting it with banks.

Mr. Hindin: Either the account was ultimately paid or it wasn't paid; either paid through the trade acceptances——

The Court: Well, the trade acceptances were either paid or not paid.

Mr. Hindin: Here is the only point I want to get clear, your Honor: There was originally an indebtedness for merchandise. It then subsequently appears that there were trade acceptances or negotiable instruments taken. Now, if those negotiable instruments were paid, naturally, the account is paid; but if those negotiable instruments, which

(Testimony of H. E. Graeber.)

were taken on account of those unpaid balances, were dishonored, under no theory can we say that that account was paid. There is a balance due for the original amount. That is the point that I make here; and if I am in error on that statement I would like to have Mr. Graeber tell me.

The Witness: I think you are entirely right. That is the attitude that one would take.

Q. By Mr. Hindin: Now, will you point out any other accounts there?

A. Prior to April 24, 1939?

Q. Yes, please.

The Court: Gentlemen, doesn't the claim speak for itself?

Mr. Victor Cogen: I think it speaks for itself. It [112] states right there.

Mr. Hindin: When and applied on what?

Mr. Victor Cogen: His testimony is that they got \$2,000 and they just applied it. He didn't say for what.

Mr. Hindin: Applied to the open account or for specific trade acceptances. That is the particular point. And these trade acceptances are unpaid—those covering the accounts of April 24th.

Mr. Victor Cogen: Let's ask the witness what he did with the money and which one he applied it to.

Mr. Hindin: That is all right.

Mr. Victor Cogen: Let's clear it up.

(Testimony of H. E. Graeber.)

The Witness: I didn't apply it against any particular item. I applied it against the balance of the account. In other words, a credit went against the sum total of the indebtedness. I wasn't instructed to apply it against any particular item.

The Court: In other words, you gave the total amount credit for it? A. That is right.

Q. By Mr. Victor Cogen: And this indebtedness you have here, \$1,068, was the older indebtedness owed by the Ace Distributing Company?

A. That is correct.

Mr. Victor Cogen: Well, that tells the fact there.

The Court: All right. Proceed, gentlemen. [113]

Mr. Hindin: Are you through?

Mr. Victor Cogen: Yes, I am through.

Mr. Hindin: I want to ask Mr. Graeber one or two more questions.

Q. I show you what purports to be a financial statement, which the court called for this morning and which you referred to in your testimony this morning— A. Yes, sir.

Q. —entitled "Sam Polakof and Sons, 786 Kohler Street, Los Angeles, California. Wholesale Liquor Dealer," signed by Sam Polakof, and ask you if that is the document which was submitted to your concern. A. Yes, sir.

Q. Now, to your knowledge was this Sam Polakof and Sons the same and identical concern which is also known as Ace Distributing Company?

A. I would say so, yes.

(Testimony of H. E. Graeber.)

The Court: You say, "I would say so." Why do you make that statement?

A. Well, because—

Mr. Hindin: Let me ask him this: Let's develop it this way:

Q. Were there two separate accounts—

The Court: May I see the claim?

Mr. Hindin: Perhaps we can clear this point up with a stipulation. May we have a stipulation, counsel, that [114] Marvin Polakof and Sam Polakof and the Ace Distributing Company were and are the same and identical—

Mr. Victor Cogen: No. You couldn't prove that, and that isn't true, according to our information. You couldn't prove it, because it isn't true.

Mr. Hindin: That is a matter of record. There is an adjudication on it.

Mr. Victor Cogen: That is something I know nothing of, counsel, I am sorry I can't stipulate with you.

The Court: Proceed.

Q. By Mr. Hindin: Did you have an account with Ace Distributing Company at 786 Kohler Street? A. Yes, sir.

Q. And was it an incorporated organization or was is unincorporated? A. Unincorporated.

Q. Who was it composed of?

Mr. Victor Cogen: Just a minute. I object to it unless he knows of his own knowledge; not what somebody told him.

(Testimony of H. E. Graeber.)

The Court: Counsel is asking a question that calls for his own knowledge. Can you answer the question of your own knowledge?

The Witness: Repeat it, please.

Mr. Hindin: Read the question.

(Question read by reporter.) [115]

A. I would say Sam and Ivan Polakof. They were the two gentlemen who did—who contacted our winery in regard to the Ace Distributing business most of the time.

The Court: Now, Marvin is the one that is adjudged a bankrupt.

Mr. Hindin: Marvin Polakof, doing business as Ace Distributing Company. That is a matter of the order of adjudication.

Mr. Victor Cogen: And that is why we object, your Honor, and ask that the testimony be stricken. His testimony is that they contacted him. That doesn't prove ownership. They may have agency.

The Court: But here is the proposition: You are proceeding under the theory that Marvin is the bankrupt.

Mr. Hindin: Yes.

The Court: And you have a financial statement of Sam Polakof and Sons, signed by Sam Polakof.

Mr. Hindin: Yes.

The Court: I don't think it is admissible in this proceeding.

Mr. Hindin: Unless we can establish that it is one and identical with Ace Distributing Company.

(Testimony of H. E. Graeber.)

The Court: I don't think you can prove it that way, unless Marvin—

Mr. Hindin: We will prove it.

The Court: All right. Go ahead and prove it. Proceed. [116]

Mr. Hindin: Yes, your Honor.

The Court: All right. Proceed and see what you can prove.

Mr. Hindin: At this time, then, may we offer this for identification?

The Court: It may be marked for identification.

The Clerk: Plaintiff's Exhibit 7 for identification.

Q. By Mr. Hindin: This was the statement that was given to you by Sam Polakof: is that correct? A. Yes, sir.

Q. Did Marvin Polakof ever contact you with reference to the business of the Ace Distributing Company?

A. You mean me personally?

Q. Or your company?

The Court: If he knows.

Mr. Hindin: Yes.

The Court: Of your own knowledge?

A. No; I can't testify to that, because I don't know.

Q. By Mr. Hindin: To your knowledge do the books of your company indicate any transactions with Marvin Polakof, doing business as Ace Distributing Company?

(Testimony of H. E. Graeber.)

Mr. Victor Cogen: Pardon me. I want to object to that. What his books reflect doesn't show any ownership of the business. I might have different things on my books, but that doesn't indicate the party owns it.

The Court: Let's see what it shows. [117]

Mr. Victor Cogen: All right.

A. To the best of my knowledge I don't know whether Mr. Marvin Polakof appeared on any documents.

The Court: As far as you know Marvin Polakof did not owe you any money, did he; as far as you know, of your own knowledge?

A. Only in so far as he is the Ace Distributing Company.

The Court: What?

A. Unless he is the Ace Distributing Company.

Mr. Hindin: That is all. At this time we would like, if the court please, to recall Mr. Marvin Polakof.

The Court: All right. [118]

MARVIN POLAKOF.

recalled as a witness on behalf of plaintiff, testified as follows:

Direct Examination resumed.

Q. By Mr. Hindin: Mr. Polakof, you were in with your father in the Ace Distributing Company, were you not?

(Testimony of Marvin Polakof.)

Mr. Victor Cogen: Just a minute. I object to that on the ground that it calls for the conclusion of the witness.

The Court: If he doesn't know I don't know who does. Objection overruled.

A. I would like to explain that. May I, please?

The Court: Answer the question. Were you interested in that business?

A. Yes, sir.

Q. By Mr. Hindin: When did you first become interested in that business?

A. 1933 or 1934. I think the latter part of 1933.

Q. What interest did you have in that business?

A. I was the owner of the business.

Q. You were the owner of the business?

A. Yes, sir.

Q. Where was this business conducted?

A. 786 Kohler Street.

Q. Pardon.

A. 786 Kohler Street. [119]

Q. Was there any other business conducted by you at that address? A. No, sir.

Q. Who else was in that business with you?

A. My father was the manager of the business.

Q. Your father was the manager of the business?

A. Yes.

Q. Are you familiar with your father's signature? A. I am.

Q. I show you here what purports to be a financial statement, signed "Sam Polakof", Sam Polakof

(Testimony of Marvin Polakof.)
and Sons, address 786 Kohler Street, Los Angeles, California, and ask if that is your father's signature, to your knowledge.

A. I believe it is.

Q. You would identify that as your father's signature?

A. I believe it is.

Q. Was your father in the liquor business, other than with the Ace Distributing Company?

A. No.

Q. To your knowledge was this statement given in connection with the Ace Distributing Company?

A. No.

Q. It wasn't? A. No, sir.

Q. In what business was this given, if you know? [120]

A. I don't know. I never gave authority for the statement.

Q. You gave your father a power of attorney, though, did you not?

A. That is right.

Q. That power of attorney was in force since the 18th of July, 1936, was it not?

A. If that is the date.

Q. I show you what purports to be a certified copy of a power of attorney and ask you if that is the one. A. Yes.

Q. All right. Let me ask you one or two other questions concerning this Ace Distributing Com-

(Testimony of Marvin Polakof.)

pany. Your father was general manager of that company? Yes.

Q. And acting under your authority to conduct the business? A. That is right.

Q. What authority did he have with reference to that business? What did he do?

A. He managed the business; seen that the merchandise went out.

Q. Did he buy merchandise?

A. Yes; he bought merchandise at various times.

Q. Did he arrange for credit for the merchandise?

A. Well, I know he always discussed everything with [121] my bookkeeper first before he arranged for credit.

Q. I am asking you just simply, was he authorized by you to buy merchandise on credit?

A. Oh, yes.

Q. And was he authorized by you to arrange for the necessary credit?

A. Yes; I imagine he was.

Q. Now, was there a business conducted under the name of Sam Polakof and Sons, in the liquor business, at 786 Kohler Street? A. No, sir.

Q. Was the Ace Distributing Company the only business conducted by Sam Polakof for you at that address?

A. Repeat that question.

Mr. Hindin: Repeat the question.

(Question read by reporter.)

(Testimony of Marvin Polakof.)

A. Yes.

Q. Was your father acting for you in that business on March 1, 1940?

A. March 1, 1940?

Q. Yes.

A. No; I believe Dad was ill at that time. I am not sure. I believe Dad was taken ill at that time.

Q. Were you doing business with the Acampo Winery at that time?

A. March 1, 1940? [122]

Q. Yes. A. Yes.

Q. And you were doing business with the Acampo Winery prior to that time, were you not?

A. Yes.

Q. Was your father doing business with the Acampo Winery, other than for the Ace Distributing Company?

Mr. Victor Cogen: Do you mind simplifying that question?

The Court: It has been asked and answered. He said there was only one business conducted there and there was no other business there.

Mr. Hindin: At this time, then, we will offer this in evidence, your Honor.

Mr. Victor Cogen: We object to that on the ground that no foundation has been laid. It is incompetent, irrelevant and immaterial, and no showing that Mr. Marvin Polakof authorized it; secondly, that if introduced it would be in derogation

(Testimony of Marvin Polakof.)

of a deed, and a grantor cannot say anything in derogation of a deed after delivery.

The Court: That would not apply where the charge of fraud is involved, but I can't see that a statement signed by Sam Polakof, under the name of Sam Polakof and Sons, would be of any materiality in this case; that it would tend to prove or disprove anything.

Mr. Hindin: I believe the showing has been made, your Honor, by this witness that he was the manager of the only [123] business. He wasn't engaged in any other business.

The Court: That is all right. You are stressing the fact that there was a power of attorney, but he didn't sign it under the power of attorney; he signed it individually. I am not going to admit it. I will deny it as not binding upon the defendant. In the second place, in looking over the statement of Sam Polakof and Sons, it wouldn't mean anything one way or the other, because the property was in the name of one of the sons. So it wouldn't be a false statement even under those circumstances. It wouldn't even be a misleading statement. He simply gave a statement of the assets of the three people. I think I will admit it for what it is worth. I will consider a motion to strike after the evidence is all in.

The Clerk: Exhibit 7.

(Testimony of Marvin Polakof.)

PLAINTIFF'S EXHIBIT 7

Citizens National Trust and Savings Bank of Los Angeles

Please Complete in Detail

Name—Sam Polakof and Sons

Customer at Office

Address—786 Kohler St., Los Angeles, Calif.

Business—Wholesale Liquor Dealer

For the purpose of procuring and establishing credit from time to time with you, the undersigned furnishes the following as being a full, true and correct statement of its financial condition on the date given below.

In consideration of the granting of such credit, the undersigned agrees that in the event of any material change in financial condition from that as hereinafter set forth, the undersigned will immediately notify you of such change and the extent and character thereof, and agrees that if the undersigned should at any time fail or become insolvent, or commit an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be attempted to be obtained or held by writ of execution, garnishment, attachment or otherwise, at the instance of any other person, firm or corporation, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then

(Testimony of Marvin Polakof.)

and in either such case, at your option, all or any of the obligations of the undersigned to or held by you shall become immediately due and payable without demand or notice, and the same may be charged against the balance of any deposit account of the undersigned with you, the undersigned hereby also giving and creating a continuing lien upon such balance of deposit account from time to time existing to secure all obligations of the undersigned to or held by you, either as borrower or guarantor.

Financial Condition as of March 1, 1940

Assets	Amount
Cash in Citizens Natl. Bk.....	\$
Cash in Other Banks (Detail)	
Cash on Hand and in Calif. Bank.....	1,181.26
Accounts Receivable—Good	7,305.21
Notes Receivable—Good (Detail)	
Inventory of mdse on hand.....	3,660.20
Due from relatives.....	
Listed Stocks and Bonds (Itemize on Reverse)	
Unlisted Stocks and Bonds (Itemize on Reverse)	
Acampo	2,500.00
Real Estate and Buildings (Itemize on Reverse)	
U. S. Gov. Appr.....	20,500.00
Mortgage and Trust Deeds (Itemize on Reverse)	
Cash Value Life Insurance.....	750.00
Automobiles, etc. & trucks (3).....	1,400.00
Personal Property	
Other Assets (Detail)	
Machinery and Equipment.....	2,298.00
Total.....	<u>\$39,594.67</u>

(Testimony of Marvin Polakof.)

Liabilities

	Amount
Notes Payable to Citizens Natl. Bk.....	\$
Notes Payable to Other Banks (Detail)	
Accounts Payable	8,970.68
Notes Payable to Others (Detail).....	
Income Tax Payable.....	
Unpaid Taxes & Interest.....	
Mortgages or Liens on Real Estate (Itemize on Reverse)	3,000.00
Loans on Life Insurance.....	
Installment Contracts & Chattel Mortgages.....	
Other Liabilities (Detail)	
Total Liabilities	
Net Worth	27,623.99
<hr/>	
Total.....	\$39,594.67

Annual Income

Salary	\$
Securities	
Rentals	2,100.00
Business	4,500.00
Otherwise	
<hr/>	
Total Income	\$ 6,600.00

Annual Expenditures

[Not filled in]

Life Insurance—\$15,000.00. Payable to—Estate.

In What Companies?—Occidental & Great North.

Auto Liability Insurance?—\$20,000.00.

Have you ever been in Bankruptcy?—No.

What Contingent Liabilities? (Endorsements,
Surety, Judgments, Suits)—None.

I hereby certify the above statement, including
the reverse side, to be true and correct to the best
of my knowledge and belief.

Date Signed—Mar. 1, 1940.

(Sign here)—SAM POLAKOF

REAL ESTATE—Title stands in name of:

Has Homestead been declared?

Insurance Coverage?

Legal Description, Street Address and Type of Improvements	Value	ENCUMBRANCE		Rental Income
		Amount	Owing To How Payable	
one half That portion of the Southwest Quarter of Section 4, Township 1 South, Range 10 West S. B. M. 660' by 1340'.....	\$12,000	None		
U. S. Gov. Appraisal (Aug. 1939) \$24,000.00				
Home 2227 Aaron St.....	5,500	3,000	Calif. Bank	24.00 monthly
1/3 inter Apt. house and store 1237 Riverside Dr.....	3,000	None		

(Testimony of Marvin Polakof.)

Stocks & Bonds—Standing in name of:

Number of Shares or Face Value of Bonds—500

Description—Acampo Winery

Where Listed—

Present Market Value—\$2,500.00

Amount Pledged—None.

Mortgages & Trust Deeds Owned—Standing in
name of: [Not filled in]

References:

Q. By Br. Hindin: Now, you were the owner of this Ace Distributing Company as of September 30, 1940, were you not, Mr. Polakof?

A. Yes.

Q. I show you a statement and ask you if that is your signature.

A. Yes; I believe that is my signature.

Q. Do you recall signing this statement as of the condition of business on September 30, 1940?

A. Yes.

Q. To whom was that statement sent? [124]

A. I don't know.

Q. Was that sent to the Alta Winery, do you know? A. I don't know.

Q. I show you another statement as of that date. Is that your signature?

A. Yes; that is my signature.

Q. Do you know whether this statement was rendered to anyone or not?

(Testimony of Marvin Polakof.)

A. That I don't know.

Mr. Hindin: I will offer these for identification only.

The Court: Let me see them.

Mr. Hindin: Yes, your Honor.

The Clerk: 8 and 9 for identification.

The Court: Proceed.

Mr. Hindin: At this time we will offer them in evidence, if the court please.

Mr. Victor Cogen: If the court please, we object to them on the ground that they are incompetent, irrelevant and immaterial, and the statement does not purport to say as to what property this is. It just says "real estate". It is the only statement that is in there, if I am correct in my brief glance at it, so it does not tend to prove or disprove any issue in this case.

The Court: They will be admitted as next in order.

The Clerk: Plaintiff's Exhibits 8 and 9.

(Testimony of Marvin Polakof.)

PLAINTIFFS EXHIBIT 8

ACE DISTRIBUTING CO.

Wholesale Dealers—Fine Wines
784-786 Kohler Street, VAndyke 6577
Los Angeles, California

STATEMENT OF MARVIN POLAKOF
dba ACE DISTRIBUTING CO.,
as of September 30th, 1940

Assets

Cash on hand and in banks.....	\$ 1,550.95
Accounts receivable current.....	7,183.50
Past due over 60 days.....	660.80
Inventory	6,738.96
Real Estate	15,000.00
Plant, machinery, furniture and fixtures.....	4,886.82
	<hr/>
	\$36,021.03

Liabilities

Accounts payable	\$ 1,062.87
Acceptances payable	5,589.14
Reserve for bad depts.....	660.80
Encumbrance on Real Estate (plant building).....	10,500.00
	<hr/>
Total liabilities	17,812.81
Net Worth	18,208.22
	<hr/>
	\$36,021.03

In addition we value good-will and trade marks at \$5,000.00 but for the purpose of the above no value is given.

(Testimony of Marvin Polakof.)

PROFIT AND LOSS ACCOUNT

From Oct. 1st, 1939 to Sept. 30, 1940

Sales	\$51,806.75
Returns, allowances, discounts.....	927.70
Mchdse. cost	39,885.53
Gross profit	12,748.92
Expenses	9,314.77
Net Profit	3,434.15

The above is a full true and correct statement of the affairs of the Ace Distributing Company.

Dated at Los Angeles, California, October 2nd, 1940.

MARVIN POLAKOF

[Plaintiff's Exhibit 9]

Ace DISTRIBUTING CO.



WHOLESALE DEALERS • FINE WINE
784-786 KOHLER STREET Vandyke 657
LOS ANGELES, CALIFORNIA

Filed & No.
10/24/40
L.H.M.

Page 11

Balance sheet as of 10/24/40

Assets

Cash on hand in bank	535.55
accounts receivable good	783.50
raw material labels etc	82.50
Inventory	500.346
accts receivable past due	600.85
machinery & fixtures	886.00
Real Estate & Bldg	1000.00
Good will & trade marks	1000.00
Debt & cash	1035.75

RE No. 37541-17
Polakoff Marum
BANKRUPT

Trustee
EXHIBIT No. C
FILED 4-10-41
Wright & Erickson
cm

Liabilities

accounts payable	1002.50
Trade acceptances	500.00
Encumbrance on Real Estate	500.00

made 50.00 purchase
in interest 1.25

Condition as of 10/24/40

net worth
net assets

OUR EXCLUSIVE BRANDS

HEART OF CALIFORNIA

SAINT BRUNO

EL ENCANTO

HEART OF JAPA

NISIM KOSHER

Marum Polakoff
Oct 24, 1940
(Mount 125)



(Testimony of Marvin Polakof.)

Q. By Mr. Hindin: Mr. Polakof, you were doing business [125] with the Acampo Winery since before 1937; is that correct?

A. I believe that is correct.

Q. Did you ever discuss with any officers of the Acampo Winery or make any statement to them to the effect that you were the owner of that business?

A. It was understood. They knew I was the owner of the business.

Q. They knew that?

A. Yes. They knew that they were dealing with me.

Q. They knew that they were dealing with you?

A. That is right, as the owner of the business.

Q. Did you render any statements to them concerning your financial condition, as the owner of the Ace Distributing Company?

A. I was never asked for any statement.

Q. All right. Getting back to this property that you acquired: You testified this morning that the property was taken in your name, but for somebody else; is that true?

A. That is right.

Q. For whom was it taken?

A. It was taken for my brother.

Q. For your brother?

A. That is right.

Q. What is his name?

A. Ivan Polakof.

Q. Ivan Polakof? [126]

A. That is right.

Q. Who bought that property originally?

(Testimony of Marvin Polakof.)

A. Originally?

Q. Yes.

A. It was bought by my father and Mr. Fratkin, in my name.

Q. In your name? A. That is right.

Q. Who paid for that property?

A. My brother paid for it.

Q. What business was your brother in at that time? A. In various businesses.

Q. Well, what were they?

A. Oh, he had property on Riverside Drive, rental properties. He had property in Maywood. He had various properties; various businesses.

Q. Were you present when Ivan paid for that property? A. No, sir.

Q. How do you know that Ivan paid for that property?

A. I know he paid for it, because my father didn't have that kind of money to buy the property with. I know for a fact he paid for it. I know what property he sold in order to derive the money in order to pay for it.

Q. But you weren't there when the money was paid over, were you?

A. No; I can't say that I was. [127]

Q. Were you present when Mr. Fratkin gave you a deed covering his interest in that property?

A. Yes; I was. That took place in Mr. Brody's office.

Q. And at that time both you and Mr. Fratkin were there; is that right?

(Testimony of Marvin Polakof.)

A. That is right.

Q. At that time you received a deed, which is No. 2 in order here, between Fratkin and yourself, conveying all of the interest to yourself; is that right?

A. That is right.

Q. In other words, the purported effect of this, as far as you were concerned, was to put the entire title in yourself; is that correct?

A. No. The important thing was to make sure that Mr. Fratkin got the money.

Q. Yes.

A. And that took place in Mr. Brody's office.

Q. Who paid Mr. Fratkin his money?

A. Mr. Brody.

Q. Mr. Brody paid for it?

A. Yes.

Q. Did Mr. Brody pay it for himself?

A. For Ivan Polakof.

Q. For Ivan Polakof?

A. That is right.

Q. You were there at that time? [128]

A. That is right.

Q. Now, during this period of time you gave a mortgage on that property, did you not, of a thousand dollars?

A. To Mr. Fratkin.

Q. Yes. Did Ivan give that mortgage or did you give it?

A. I believe I gave it and Ivan paid for it.

Q. That was when Mr. Brody gave this—

A. That is right. I believe it was \$300 in cash, and on the balance they came to some terms between themselves.

(Testimony of Marvin Polakof.)

Q. Was Ivan in business at that time?

A. At that time?

Q. Yes.

A. Yes; he was in business.

Q. With your father?

A. No; by himself.

Q. Was your father in business at that time?

A. He was managing the Ace Distributing Company.

Q. And that was for you?

A. That is right.

Q. How long did the title in this company remain in your name?

The Court: The record speaks for itself, counsel.

Mr. Hindin: All right.

Q. During this time you were buying merchandise on credit, were you not? [129]

A. At what time are you referring to?

Q. Between the date that you got the property and the date that you ultimately transferred it?

The Court: The records show that, counsel. He was dealing with this wine company all the time.

Mr. Hindin: Yes.

The Court: He was buying merchandise all that period.

Mr. Hindin: Yes.

Q. Is that right? A. That is right.

Q. Did you tell anybody at that time that you were not the owner of this property?

A. I had no reason to tell them, because I never felt it was mine.

(Testimony of Marvin Polakof.)

Q. Notwithstanding that the record appeared in your name?

A. That is true.

The Court: Did you ever tell anybody that it was yours?

A. I never told anyone it was mine, because I knew it wasn't mine. I knew it was my brother's.

Q. By Mr. Hindin: Notwithstanding that you were in business and got credit for your business?

A. Yes; but no credit was ever extended on the thought of this property being mine, at all.

Q. When did you go back east?

A. 1937, the first time, I believe. [130]

Q. The first time was in 1937? A. Yes.

Q. And during all this time your business was being operated by your father? A. Yes.

Q. While you were in the east, that was the time you executed that deed to your brother; is that correct?

A. That is true.

Q. Will you tell us about this \$10 that your received from your brother?

A. I told that this morning, Mr. Hindin. Do you remember?

Q. Yes. Was that sent to you by cashier's check, do you know, or was it a personal check.

A. I believe it was a personal check.

Q. On what bank was that drawn?

A. I can't recall.

Q. Do you remember who drew it?

A. I believe my brother drew it.

(Testimony of Marvin Polakof.)

Q. Ivan? A. Yes.

Q. To whose order was it made? A. To me.

Q. Did you cash that check?

A. I am quite sure I did.

Q. Whereabouts did you cash it, do you know?

[131]

A. I believe in Omaha; yes, in Omaha.

Q. Let me call your attention, Mr. Polakof, to questions and answers given at the same hearing that we referred to this morning. Let me ask you if you recall this question being asked you:

“Q—To whom did you dispose of it?”—referring to the Baldwin Park property.

“A—To my brother Ivan.

“Q—What did he pay you for it?

“A—Why, there was no actual payment at all. I don’t know how to explain the legal terms of it, but for and in consideration of, I think it was, \$10.”

Q. Do you recall giving that testimony?

A. Yes. I was trying to explain that testimony—what the deed said—and nothing in regard to the \$10. I explained to you that I was getting married and he sent me \$10 and said, “Use it to your advantage,” or “Buy your wife a small gift.” I can’t tell you what the exact language was.

Q. But you received that with the request to send him the deed; is that correct.

A. That is right.

Q. Did Ivan tell you that \$10 he sent you was for a wedding present?

(Testimony of Marvin Polakof.)

The Court: Counsel, I have heard enough about this \$10. I think it is immaterial, as far as this case is concerned, [132] whether it was \$10 or 10 cents or nothing. I have heard enough about it. I am not going to take up all afternoon in examining a witness about \$10.

Q. By Mr. Hindin: When this property was transferred by you did you know the financial condition of your business?

A. I had no reason to feel that anything was wrong with the financial condition of my business.

Q. Did you know what your assets were?

A. No.

Q. Did you know what your liabilities were?

A. No. I left it all in my father's hands, with the good advice of Mr. Kahn, my bookkeeper.

Q. You don't know whether or not you were insolvent or solvent then?

A. I would say this: If there was anything wrong with the business I would have been notified immediately, and I was never notified.

Q. Let me ask you this: Is it my understanding, then, that while your father was conducting this business for you you didn't know whether you had enough money to pay the bills as they came due, or not?

A. I would like to make it clear that the reason my father was managing the business was the fact that I wanted to attend law school.

Q. You went to law school?

A. That is right. [133]

(Testimony of Marvin Polakof.)

Q. How long did you go to law school?

A. I went to law school, oh, I imagine three years.

Q. You went to law school for three years?

A. Yes, sir.

Q. That was during this time?

A. Well, off and on during this time, due to the fact I would start and I would have to be called back on account of the business, and I would have to make another start again.

Q. How many times were you called back on account of the business?

A. When father wanted to take a vacation, that was one of the times. Father became ill; that was another time. Then there was trouble with some help there and I had to come down and help out. In other words, at various times I couldn't apply myself to study, because I had to help out in the place.

Q. Did you, at any time that you returned, go over the financial condition of your business with anyone?

A. With Mr. Kahn?

Q. Was he your accountant at that time?

A. He was.

Q. How old were you at that time, Mr. Polakof?

A. At what time?

Q. 1936?

A. 1936. I am 28 now. In 1936— [134]

Mr. Hindin: I think the court will take judicial notice of the computation.

(Testimony of Marvin Polakof.)

The Witness: Wait just a minute. 25—24.

Mr. Hindin: I see. I think that is all.

The Court: - We will take a five-minute recess at this time.

(Recess.)

The Court: Proceed.

Cross Examination

Q. By Mr. Victor Cogen: The business was located at 784-86 Kohler Street, in the City of Los Angeles? A. That is right.

Q. In September, 1940, you had an agreement with reference to that real estate, to purchase it?

A. I did.

Q. Was there about \$10,500 owing at that time?

A. That was the approximate figure.

Q. Was that considered, the plant building, on the books of the company?

A. That is right.

Q. When you refer in the statements, Exhibits 8 and 9, to an encumbrance on real estate (plant building) \$10,500, that refers to the building located on Kohler Street? A. Yes.

Q. When you refer to it on the assets, real estate \$15,000, was that the building located on Kohler Street? [135] A. Yes.

Q. That is the only building intended by both these statements? A. That is right.

Q. And that is not the property in Baldwin Park? A. That is right.

Mr. Victor Cogen: That is all.

(Testimony of Marvin Polakof.)

Redirect Examination

Q. By Mr. Hindin: With reference to this property, real estate \$15,000, what was that property?

A. That was the building at 784-86 Kohler Street.

Q. As a matter of fact, Mr. Polakof, you had an option to purchase that property, did you not?

A. That is right.

Q. You did not own that property, did you?

A. We were paying on it.

Q. I show you what purports to be a document entitled "Agreement", dated the 15th day of August, 1940, with your signature; is that right?

A. That is my signature.

Q. Is that the agreement which covers this particular item of \$15,000?

A. I believe this is the agreement; yes.

Q. That is the agreement which refers to that, and this is the only agreement that you have with reference to the purchase of that property; isn't that right? [136]

A. I believe there was another agreement. I am not sure.

Q. Where is the other agreement?

A. Mr. Bokofsky or the owner of the building would know.

Q. What did the other agreement contain?

The Court: What does that show as the purchase price?

(Testimony of Marvin Polakof.)

Q. By Mr. Hindin: What does it show the purchase price to be, \$10,500; is that correct?

A. That is correct. The statement here, "plant building \$10,500."

Q. That is a liability? A. Yes.

Mr. Hindin: It will be offered in evidence.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 10.

PLAINTIFF'S EXHIBIT 10

AGREEMENT

This Agreement, Made and entered into this 15th day of August, 1940, by and between Harold A. Davis, Eugene H. Rosenthal and I. H. Norton, hereinafter designated as "First Party", and Marvin Polakof, hereinafter designated as "Second Party",

Witnesseth:

That Whereas, first party is the owner of that certain real property situate in the City of Los Angeles, County of Los Angeles, State of California, described as Lots 150 and 151, Kohler Tract, as per Book 54, Page 51 Miscellaneous Records of said County, commonly known as 784-786 Kohler Street; and

Whereas, second party desires to purchase the said real property from first party; and

Whereas, second party now occupies the said real property as a tenant of first party.

Now, Therefore, it is agreed by and between the parties hereto as follows:

(Testimony of Marvin Polakof.)

(I) That second party shall continue to occupy the premises as a tenant of first party, up to and including December 31, 1940, and during said period second party will pay to first party, as rental, the sum of Sixty-five Dollars (\$65.00) for the month of August, 1940, payable in advance, for that portion of the premises designated as 786 Kohler Street, and no rental for the month of August, 1940, for that portion of the premises designated as 784 Kohler Street. Commencing September 1, 1940, second party will pay One hundred thirty Dollars (\$130.00) per month, as rental for the entire premises for the months of September, October and November, 1940, and One Dollar (\$1.00) for the month of December, 1940. Said payments shall be made on the first day of each and every month of the said four (4) month term.

(II) In the event that second party complies with each and every provision of the foregoing paragraph numbered (I), and is in possession of said premises on January 1, 1941, then and in that event, and in that event only, first party agrees to sell and convey to second party, and second party agrees to purchase the real property hereinabove described, upon the following terms and conditions:

(a) The purchase price shall be Ten thousand five hundred Dollars (\$10,500.00), lawful money of the United States of America, payable in installments as hereinafter set forth, together with interest at the rate of five per

(Testimony of Marvin Polakof.)

cent (5%) per annum, from January 1, 1941, on all balances of principal unpaid.

(b) In addition to the purchase price, commencing January 1, 1941, second party agrees to pay any and all taxes and assessments that may become a lien against the said real property, or any part thereof. The taxes for the year 1940-41 shall be pro rated as of January 1, 1941. First party will make the payments referred to in this paragraph, as the same become due, and will be reimbursed by second party out of the payments that will be made by second party, as hereinafter set forth.

(c) The improvements upon the said real property are now insured against loss by fire. The second party agrees to pay the cost of the policies of fire insurance upon the improvements on the said property, during the period that this contract is in force. The premiums on the said policies now in force shall be pro rated as of January 1, 1941. The said policy or policies of insurance, commencing January 1, 1941, shall contain a recital that the policy or policies are for the benefit of both parties to this agreement, as their interests may appear. First party will make the payments referred to in this paragraph, as the same become due, and will be reimbursed by second party out of the payments that will be made by second party, as hereinafter set forth.

(d) The purchase price, taxes, assessments

(Testimony of Marvin Polakof.)

and insurance, hereinabove referred to, shall be paid by second party to first party, as follows:

Five hundred Dollars (\$500.00) on the 1st day of January, 1941, and

Five hundred Dollars (\$500.00) every three (3) months thereafter, until the total purchase price, interest, taxes and insurance shall be paid by second party to first party. The said Five hundred Dollar (\$500.00) installments shall be made on January 1, April 1, July 1 and October 1 of each year. The said payments shall be applied as follows:

First, on interest due to first party.

Second, on taxes and assessments.

Third, on insurance premiums.

Fourth, balance to be applied upon principal of purchase price.

(e) Second party agrees to keep the premises in good order and repair, and first party shall not be called upon to make any repairs of any kind, nature or character, in and to the said premises.

(f) Second party agrees not to make any alterations or changes in the construction of said premises without the written consent of first party first had and obtained.

(g) In the event that first party consents to any change or alteration, or reconstruction of the said premises, the said change, or alteration shall be made at the sole expense of second

(Testimony of Marvin Polakof.)

party, and first party shall not be responsible therefor in any shape, manner or form. In the event that first party does consent to a change or alteration in the said property, or premises, second party agrees to notify first party immediately prior to the commencement of the said change or alteration, and immediately prior to the delivery of any materials to the said premises. The said notice is to enable first party to properly record and post an "Owner's Notice of Non-Responsibility" pursuant to Section 1192, Code of Civil Procedure of the State of California.

(h) First Party is also the owner of Lot 149, Kohler Tract, which joins the property which is the subject matter of this contract. At the present time there is a building erected on the said Lot 149, Kohler Tract, as well as Lot 150 of said tract. There is a wall on the boundary line between the said Lots 149 and 150, which is the wall used by both buildings, to-wit, the building on Lot 149 and the building on Lot 150. Upon the completion of the payments by second party to first party, as hereinabove set forth, second party will receive the title to Lots 150 and 151, and it therefore becomes necessary that an agreement be entered into respecting the wall between Lots 149 and 150. The parties hereto agree that the said wall on the boundary line between Lots 149 and 150,

(Testimony of Marvin Polakof.)

Kohler Tract, shall become and remain a party wall, and the common property of the said owners, their respective heirs and assigns, so that either of them shall be at liberty to use said wall by inserting timbers or other materials up to, but not beyond a vertical line drawn through the center and along the entire length of said wall, or otherwise to use the said wall in any manner that may not interfere with the equal use of the other half of the wall by the other owner. Either party may add to said wall in height, depth or thickness; in case of damage may repair; or in case of destruction may rebuild said wall, or any addition thereto. Any such reconstruction shall be of good materials and workmanship, and shall conform with the building laws of the City of Los Angeles and State of California. No addition to the thickness or height shall be made by either party on the real property of the other party without the written consent of such party.

(i) Time is of the essence of this agreement and in the event of failure by second party to comply with each and every of the terms, covenants and conditions contained herein, the first party shall be released from all obligations in law or equity to convey said property, and second party shall forfeit all rights thereto, and to all moneys theretofore paid, and second party's interest in and to said moneys or said

(Testimony of Marvin Polakof.)

real property shall thereupon immediately cease as fully as if said moneys had never been paid, or this agreement entered into, and in the event that second party should then be in possession of said real property, first party shall thereupon be entitled to immediate possession thereof and shall have as full power to dispose of said real property as if this agreement had never been made, executed or delivered.

(j) In the event that second party complies with each and every one of the terms, covenants and conditions of this agreement, and pays the full purchase price, and the interest, taxes, assessments and insurance, at the time and in the manner above set forth, first party agrees to execute and deliver to second party a good and sufficient deed, conveying said property free of encumbrances, except as follows:

(1) Conditions, restrictions, reservations and/or rights of way of record.

(2) Any encumbrance or lien created or suffered by second party.

Upon the full compliance by second party, with the terms and conditions of this agreement, first party will furnish to second party a guarantee of title or policy of title insurance, prepared by a reputable title insurance company, showing the record title of the said real property to be vested in second party.

(Testimony of Marvin Polakof.)

(k) Commencing January 1, 1941, upon the payment of the sum of Five hundred Dollars (\$500.00), as hereinabove provided, second party shall be entitled to the possession of the real property hereinabove described, and said second party shall retain possession of the said real property upon compliance with and performance of each and every of the terms and covenants and conditions of the within agreement.

(1) In addition to the quarterly payments of Five hundred Dollars (\$500.00) to be made by second party, as hereinabove provided, said second party may, at second party's option, on any payment date, pay such additional sums upon the principal of the purchase price, as second party may desire.

(III) In the event that second party records this agreement in the office of the County Recorder of Los Angeles County, or permits anyone else to record the same on behalf of second party, before second party has paid One thousand Dollars (\$1,000.00) on the principal of the purchase price, this agreement, at the option of first party, shall become null and void and of no force or effect, and all of the moneys theretofore paid by second party to first party, pursuant to the terms of the said agreement, shall be forfeited by second party as liquidated damages.

(Testimony of Marvin Polakof.)

(IV) This agreement, and any and all of the rights and privileges conferred by the said agreement, shall be and are hereby declared subordinate to any trust deeds and/or mortgages that may now be of record against the real property hereinabove described, or that may hereafter be executed and recorded.

(V) Second party agrees to pay to first party, reasonable attorney's fees in the event that it becomes necessary for first party to engage counsel for the purpose of enforcing any of the terms, covenants or conditions of this agreement.

(VI) First party agrees to pay to second party, reasonable attorney's fees in the event that it becomes necessary for second party to engage counsel for the purpose of enforcing any of the terms, covenants or conditions of this agreement.

(VII) This agreement shall be binding upon and inure to the benefit of the heirs, administrators and assigns of the parties hereto.

In Witness Whereof, the parties hereto have hereunto set their names, the day and year in this agreement first above written.

HAROLD A. DAVIS

EUGENE H. ROSENTHAL

I. H. NORTON

First Party

MARVIN POLAKOF

Second Party

(Testimony of Marvin Polakof.)

GUARANTEE

In consideration of the foregoing agreement by Harold A. Davis, Eugene H. Rosenthal, and I. H. Norton, as first party, I, the undersigned, Percy M. Barker, do hereby unconditionally guarantee the full and complete performance of the said agreement by Marvin Polakof, named therein as second party, and I do further unconditionally guarantee that the said Marvin Polakof shall make each and every of the payments that shall become due to first party, pursuant to the terms of the said agreement, including attorney's fees, as recited therein. I do further consent that the time for the making of any and all payments may be extended from time to time, before, at, or after maturity, without notice to me, and I do hereby waive demand and notice of non-payment. It is my intention to unconditionally guarantee the performance of the foregoing agreement on the part of Marvin Polakof.

Dated: August 15th, 1940.

PERCY M. BARKER

State of California,
County of Los Angeles—ss.

On This day of August, 1940, before me, Jeanette Glogau, a Notary Public in and for said County and State, personally appeared Harold A. Davis, Eugene H. Rosenthal and I. H. Norton, known to me to be the persons whose names are

(Testimony of Marvin Polakof.)

subscribed to the within Instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public in and for said
County and State.

State of California,
County of Los Angeles—ss.

On This day of August, 1940, before me, a Notary Public in and for said County and State, personally appeared Marvin Polakof and Percy M. Barker, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public in and for said
County and State.

The Court: Any further questions?

Mr. Hindin: No; I have nothing further.

Mr. Victor Cogen: That is all.

The Court: Call your next witness. [137]

MAURICE KAHN,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Maurice Kahn.

Direct Examination

Q. By Mr. Hindin: What is your business or occupation? A. I am a public accountant.

Q. Are you a certified public accountant?

A. No, I am not.

Q. Did you have charge of the books of the Ace Distributing Company? A. Yes, I did.

Q. From what date to what date?

A. Well, up until about March or April, 1939 I was working there as a full time bookkeeper, and then subsequently I was there on a part time basis.

Q. When did you first go to work there? You said "up to"—

A. I believe about 1936. I am not sure of the exact date.

Q. During that period of time what were your duties with reference to the books? Did you make the original entries?

A. I made all the entries.

Q. I show you what purports to be two sets of books [138] and ask you if those are the books of the Ace Distributing Company?

A. Yes, they are.

Q. Are those the books that you kept for them during the period that you were engaged?

(Testimony of Maurice Kahn.)

A. They are.

Q. Does there appear on those books a list of accounts payable or the creditors of the business, as of any given date? A. Yes; there is.

Q. Calling your attention to the creditors of that business, as of April 24, 1939, what were the names of those creditors?

A. I will have to give you the figure as of April 30th. In other words, the books here—the entries were made in toto at the end of the month.

Q. I think we can save considerable time by asking this question: On that date, April 24th, or the next posting period, April 30th, was the May Company listed as a creditor? A. It was not.

Q. Was Mr. Elmer J. Walther listed as a creditor? A. He was not.

Q. Was the Royal Credit Jewelers listed as a creditor? A. They were not.

Q. Was the Acampo Winery listed as a creditor? [139] A. Yes; it was.

Q. What was the amount of their claim as of that date?

A. According to the records it was \$10,487.43.

Q. That was subject to any allowances for discounts—— A. That is right.

Q. —or any refunds? A. That is right.

Q. Do the books of the company reveal any inventory statement as of that time?

A. No; they do not.

(Testimony of Maurice Kahn.)

Q. When was the nearest inventory period taken after that time?

A. Well, according to the ledger the only record I have of an inventory period was as of December 31st of the previous year. In other words, it was set up in the books as of January 1, 1939.

Q. Set up as of January 1, 1939?

A. That is right.

Q. What was the inventory as of that time?

A. \$6,553.99.

Q. There was an inventory taken at the end of December, was there not? A. That is right.

Q. What was the inventory at that time?

A. I will have to check this. As of January 1, 1940, it was \$2,501.42. [140]

Q. In other words, there was a decrease in inventory by approximately \$3,500 during that period?

A. \$4,000.

Q. Approximately \$4,000 between the 1st of January, 1939 and the 31st of December, 1939?

A. That is right.

The Court: When you refer to inventory that means total assets of the company?

A. No; that means just merchandise for resale.

Q. By Mr. Hindin: During this period was there a profit and loss statement made by you?

A. You mean at the end of the year?

Q. Was there any profit and loss statement made as of December 31, 1938? A. Yes; there was.

Q. What did that show as the profit or loss?

(Testimony of Maurice Kahn.)

Mr. Victor Cogen: If the court please, isn't that beside the point? As I understand, there are only two dates that are actually involved; one is the date of the execution of the instrument in 1937——

The Court: But if they can show he was insolvent on December 1, 1938 and insolvent again on December 1, 1939 they have him pretty near hooked on the insolvency question, haven't they?

Mr. Victor Cogen: Well, I can't see——

The Court: It seems to me if there was no actual [141] inventory taken on that particular date, then they couldn't prove it.

Mr. Victor Cogen: I suppose that is the best evidence anyone could produce, but I still feel it isn't the proper evidence.

The Court: Objection Overruled.

Mr. Victor Cogen: May I interpose a statement? The proof of insolvency is mainly ability to pay or not to pay, and I refer to two code sections of the California State Law, which is the applicable law; I refer to Sections 3077 and 3450.

The Court: Well, this is evidence that tends to establish or not establish certain facts, and it is admissible, in my opinion.

Mr. Victor Cogen: I didn't hear the last sentence.

The Court: Proceed.

The Witness: Will you repeat the last question?

Mr. Hindin: Will you read the question.

(Question read by reporter.)

(Testimony of Maurice Kahn.)

A. That was December 31, 1938?

Q. Yes.

A. It showed a profit of, as of the end of the year 1938, \$1,321.69.

Q. Was there, between that time and the next account period—what was the result of that period's operations? In other words, the profit and loss statement as of December [142] 31, 1939?

A. It showed a loss of \$92.19.

Q. I show you a financial statement and ask you if you have ever seen that before?

A. Yes, I have.

Q. What is this financial statement?

A. It is headed, "Financial Statement of Ace Distributing Company as of December 31, 1939." It shows a deficit of \$2,196.69.

Q. Over what operating period is that?

A. Well, that is the condition of business as of that date.

Q. In other words, the business was insolvent by the sum of \$2,196.69 as of December 31, 1939?

(Testimony of Maurice Kahn.)

The Court: Just a moment. That doesn't show any such thing. You asked him for the profit or loss. Introduce the statement, and then I can read it.

Mr. Hindin: All right.

The Court: Who prepared the statement?

A. I did.

Q. By Mr. Hindin: I show you what purports to be a financial statement of Ace Distributing Company as of December 31, 1939, which shows an insolvent condition to the extent of \$2,196.69—

Mr. Hindin: I will offer this as plaintiff's exhibit next in order. [143]

PLAINTIFF'S EXHIBIT 11

FINANCIAL STATEMENT OF ACE DISTRIBUTING CO. as of December 31, 1939

	Assets	Liabilities
Cash on hand.....	\$ 234.75	
Cash in Bank.....	21.56	
Trucks, Factory Fixtures & Equipment and Office Fixtures & Equipment (Depreciated value)	2,270.46	
Trade accounts receivable (Good).....	3,255.76	
Trade accounts receivable (Doubtful).....	76.05	
Wine Inventory	2,501.42	
Accounts Payable		10,556.69
Deficit	2,196.69	

The Court: Is that made up from the records of the company?

(Testimony of Maurice Kahn.)

A. I was just noticing something there that has come to my attention now, about what I considered certain assets, that aren't in there. In other words, it will show—as the questions go on I suppose it will come out.

Mr. Victor Cogen: Do you mean there are other assets, other than what is mentioned in there?

A. It is a question of what is considered assets, and I wouldn't want to venture an opinion on that.

Mr. Hindin: We will go into that.

Q. Was there a balance sheet, such as this one, prepared by you in December, 1938?

A. I have one here in the journal.

Q. As of December, 1938?

A. Well, it is the same thing. It is a balance sheet setting up those accounts for January 1, 1939.

Q. What was the condition of that business at that time?

A. Well, I didn't set it up as a net worth there. In other words, I can just give you a brief idea here, and I think it will save time. We show accounts payable here \$12,866.06. I am going to give this to you in round figures; if there are any errors we can correct it. Cash in bank and cash on hand, approximately \$770. Fixtures, equipment and trucks amount to, I would say, approximately \$3,000. Trade accounts receivable \$3,827.17. January 1st inventory [144] \$6,553.99. Then there is a miscellaneous item here that would have to be broken down.

Q. What is that miscellaneous item?

(Testimony of Maurice Kahn.)

A. It consists of Marvin Polakof's drawings and what I call here "miscellaneous accounts receivable." In other words, they were not trade accounts receivable.

The Court: What does that show as to solvency or insolvency at that time?

A. Well, let's see——

The Court: Have you ever added them up?

A. I think it shows it was solvent.

Q. By Mr. Hindin: By how much, approximately?

A. I would say about \$2,000.

Q. In other words, between the period of time of December 31, 1938 and December 31, 1939 the business showed a changed condition of some approximately \$2,000 net worth to a \$2,000 deficit; in other words, a loss of \$4,000?

A. Taking what I have just said for granted, yes. That is subject to recheck of the exact figures.

Q. Have you made any attempt to ascertain the solvency or insolvency of this business as of April 24, 1939?

A. I was asked to do so and I made a statement as of April 30, 1939.

Q. What was the net worth or deficit at that time?

A. Well, I must explain this. In regard to the inventory, I had no record or there were no records avail- [145] able to show if an inventory had been taken as of April 30th, and I had to estimate the

(Testimony of Maurice Kahn.)

approximate inventory at that time. And from that estimate——

Q. Let me ask you one more question. What method did you use in computing the estimated inventory as of that time?

A. Well, I took the sales and purchases for the years 1936, 1937, 1938 and 1939, and figured what the profit on sales were, and then working back—in other words, taking the purchases up to that time—or rather, it was working backwards. I took the sales up to that period and deducted the approximate profit, which should have showed the amount of the goods sold. Then I took the beginning inventory, plus the purchases up to that period, and deducted that from it.

Q. What basis of mark-up did you take?

A. To arrive at that figure I took a 21 per cent profit on the sales.

Q. Would the fact that during this period, during the period of one year's time, during which this time was in the center of that period, was the fact that the business showed approximately a \$4,000 loss taken into consideration, also?

A. I don't quite understand your question.

Q. Well, I mean your mark-up of 21 per cent gross profit on sales?

A. That is not the mark-up. That is the profit on [146] sales.

Q. Yes. Would the fact that the business, during

(Testimony of Maurice Kahn.)

this period, was showing a loss, change that position any? A. I don't see why it should.

Mr. Victor Cogen: Just a moment. I object to that question. I think it assumes a fact not in evidence.

Mr. Hindin: All right.

The Court: Well, he has answered it.

Mr. Victor Cogen: All right.

Q. By Mr. Hindin: Basing your estimated inventory on approximately 21 per cent mark-up, what was the condition of that business as of April 24th?

A. This is April 30th. From the figures I gathered it shows a net worth of \$37.08.

Q. In arriving at that net worth you have deducted from the assets the liabilities, have you not?

A. That is right.

Q. As a liability, do the books reveal the existence of May Company as a creditor?

A. No; it does not.

Q. Does it reveal the existence of Mr. Elmer J. Walther as a creditor? A. It does not.

Q. Does it reveal the Royal Credit Jewelers as a creditor? A. It does not. [147]

Q. Now, if a claim by Mr. Walther, in the sum of \$100, were added to the account——

The Court: Well, that is self-evident, counsel. You don't have to ask him, "If you add a hundred dollars would it make him insolvent?" Assume that the court has some sense.

(Testimony of Maurice Kahn.)

Mr. Hindin: That is all, then, your Honor.

Cross Examination

Q. By Joseph Cogen: Mr. Kahn, may I see that statement from which you gave this last figure?

The Court: As I understand, Mr. Witness, on January 1st they were solvent and, according to your figures, had a net worth of approximately \$2,000?

A. I would say approximately \$2,000.

The Court: And you estimated that on April 30th, without taking an inventory, they had lost virtually that \$2,000?

A. From these figures it would look like that.

The Court: How do you account for that?

A. Well, in checking over these——

The Court: Were there withdrawals or a drop-off in business, or what?

A. Well, the whole thing is here. There must have been withdrawals of about \$1300 during that period that are in this miscellaneous accounts receivable. In other words, here the total shows, "M. Polakof and miscellaneous receivables \$2,181.01." In going over the records as of [148] April 30th, Marvin Polakof himself is charged with \$26.15. Then there is set up, as assets here, Sam Polakof \$1300, and Ivan \$300. Then there are some sales and things like that that were set up as assets. In other words, advances to salesmen.

(Testimony of Maurice Kahn.)

The Court: All right. Proceed. You said you had some explanation you wanted to make of this statement.

A. In regard to this inventory. It is almost self-explanatory. In other words, taking this 20 per cent profit——

The Court: I don't mean on April 30th.

A. No. This is for 1938 and 1939.

The Court: Where is that last exhibit? You said you had some explanation of Exhibit No. 11.

A. Well, in other words, that does not include what is set up here as assets, Sam's special account and Ivan Polakof. In other words, there was a question at that time, when I made that up, whether or not it consisted of that. I don't know who I made that up for or who it was used for. It may have been for my own information or Sam Polakof or Marvin Polakof. I don't even know what it was used for.

The Court: All right.

Q. By Mr. Joseph Cogen: Mr. Kahn, in keeping your books you considered this was a wine distributing business, didn't you? [149]

A. That is right.

Q. And in making up your cost of purchases you included the price of labels, bottling supplies and what else?

A. Well, here is what is included in the cost of merchandise: The wine itself, bottles and bottle supplies, labels, and hauling.

(Testimony of Maurice Kahn.)

Q. In making your estimated inventory as of April 30, 1939, did you have any bottles, bottle supplies or labels on hand?

A. I didn't calculate it from that basis at all.

Q. Do you have any way of estimating the possible amount that you might have on hand?

A. Well, I would have to calculate it in a different way altogether. In other words, what I have done here——

Q. Could it have been as much as \$500?

A. Well, that is hard to say. In other words, I really can't voice an opinion here, unless I know what I am talking about, and I can't say anything unless I have figures to work with.

Q. On this statement you refer to these various items as expenses, inasmuch as they are not included in your statement of assets and liabilities?

A. They should be included up here in this estimated inventory.

Q. In other words, your estimated inventory would be increased that? [150]

A. Well, I don't quite get your question.

Q. Wouldn't they be separate items? Wouldn't that be increased here?

A. This is the idea: If I calculate this from a different basis altogether; in other words, if we take the inventory and the purchases and bottle supplies and hauling, and if we know what our market is and know the sales, we might arrive at a different inventory figure.

(Testimony of Maurice Kahn.)

The Court: Isn't it a fact that that figure might vary \$500 one way or the other?

A. Oh, yes; very easily.

Q. By Mr. Joseph Cogen: On the basis of this inventory this statement was made. During the early spring didn't the company you worked for sell a considerable amount of religious wine during that period?

A. Well, it all depends. Around April 30th, they would at that time.

Q. And wasn't there quite a mark-up in religious wine?

Mr. Hindin: During what period?

Mr. Joseph Cogen: The spring of 1939.

A. Yes; there would be.

Q. Would that mark-up affect your total percentage?

The Court: Did that wine cost more or did you make a better profit?

A. The wine cost the same price, but instead of a 25 per cent mark-up it was a hundred per cent mark-up. [151]

The Court: Religion costs money sometimes.

Q. By Mr. Joseph Cogen: Would that increase your inventory in any way, if it had an adverse influence on merely four months, instead of twelve months?

The Court: Counsel, he said it might vary \$500.

Q. By Mr. Joseph Cogen: Did this business have as many as a hundred customers?

(Testimony of Maurice Kahn.)

A. More than that.

Q. How much business were they doing per month?

A. Well, I can give that to you in a hurry. What period do you want?

The Court: How much were you doing in 1939?

A. 1939? Well, the whole year showed—wait a second. Sales for 1939 were \$41,000.

Q. By Mr. Joseph Cogen: Were the sales made in wines bottled under distinctive labels?

A. Well, they sold both bulk and bottled goods.

Q. What labels were used to sell that wine?

A. Well, we had three different labels. One was a very special package; the other one was medium priced; the other was high priced.

The Court: All the same wine? A. Yes.

Mr. Joseph Cogen: Yes, your Honor. We will stipulate to that.

Q. Do you know of your own knowledge whether or not [152] people would ask for wine under distinctively different labels used by the Ace Distributing Company? A. Yes.

Q. Do you know how long those labels were used?

The Court: What is the materiality of that?

Mr. Joseph Cogen: I am trying to build up a value for good will, your Honor.

The Court: Well, you are just wasting a lot of time of this court, both of you. Both sides have killed half the time here today. Go ahead.

(Testimony of Maurice Kahn.)

Mr. Joseph Cogen: Just one question more.

Q. You have already answered, I believe, that the business did not show a loss for a year, or only showed a loss of \$92, whereas, the difference in assets and liabilities was decreased by——

A. It was an approximation. In other words, the loss for that year was \$92, but the decrease in net worth was approximately four thousand.

Q. And that is explained by drawings, and so forth, from the business? A. That is right.

Q. Did your books ever show that Marvin Polakof ever owned the Baldwin Park property?

A. No; they did not.

Q. Do you know of your own knowledge whether or not a statement was ever made by Marvin Polakof that he owned [153] the property, and secured credit on that?

A. Of my own knowledge I don't know.

Q. On April 24, 1939, and previous thereto do you know whether or not the Ace Distributing Company was being threatened with suits by the creditors?

A. To my knowledge they never were.

Q. Can you tell us in what manner they were paying their bills?

A. Well, they had a very good reputation. They may have been a little slow, but they always paid them.

Q. They always paid their bills? A. Yes.

Mr. Joseph Cogen: That is all.

(Testimony of Maurice Kahn.)

Redirect Examination

Q. By Mr. Hindin: Between April 30, 1939, and the date of the bankruptcy did the net worth of the business at any time increase from this insolvent condition?

A. Well, just without basing my answer on any figures—in other words, just from what I know of the general condition of the business, I would say no, except for a period when there was a credit supposed to have been issued by the Acampo Winery that would change the whole net worth picture.

Q. Was their liability increased accordingly?

A. What is that?

Q. Was their liability increased accordingly?

[154]

A. You mean from 1939 did the liabilities go up?

Q. Yes.

A. I can give you that answer in a second. Well, it looks as if in 1939, April, 1939, we show liabilities, that is, accounts payable, of \$11,348. And I notice here in February, 1940, there was only \$8,970.16, but I don't know what would account for that. I mean I would have to check the records.

Mr. Hindin: That is all.

Recross Examination

Q. By Mr. Joseph Cogen: What was the first time, to your knowledge, that the Ace Distributing Company was threatened with suit by the creditors for not paying?

(Testimony of Maurice Kahn.)

A. I would say about August, 1940, that I know of personally.

Q. Would that be in reference to the transaction with the Acampo Winery?

A. Well, this was during the period that this Mr. Bokofsky was there, and anything could happen then.

Q. I see.

Mr. Joseph Cogen: That is all.

Redirect Examination

Q. By Mr. Hindin: Did you ever discuss the financial condition with Mr. Marvin Polakof?

A. That is hard for me to say. In other words, I don't remember. [155]

Q. Did Mr. Polakof, during this period, ever talk about—

A. During what period are we talking about?

Q. Prior to April 24, 1939? A. No.

Mr. Hindin: That is all. Plaintiff rests.

Mr. Victor Cogen: If your Honor please, I am going to move for a nonsuit. Frankly, your Honor, I think a short review of this testimony discloses that there actually were only four creditors, and two of them were secured claims. There is no showing that the security was insufficient. The third one was an attorney's fee, and as far as I could see there was no statement ever sent. It was just on his books, and he, as he said, just put the charge on the books, and he referred to nothing for any evidence

(Testimony of Maurice Kahn.)

of payment or where he would get paid. The fourth one is the Acampo Winery. The Acampo Winery has stated that they did business with the Ace Distributing Company for a period of years, and they never got a financial statement; not one. And it wasn't until some time in 1940, after Mr. Bokofsky became manager of the business and Mr. Sam Polakof died, that they ever got a statement. That is my recollection. I may be wrong about some of the figures, but the point is this: All the Acampo Winery bills were paid; everyone of them. They had a little dispute about a matter that lasted almost a year or two, but they took trade acceptances, [156] and they were executed in 1940, away subsequent to the recordation of the deed. The suit in this case is an allegation of fraud on the existing creditors. I want your Honor to recall that their witness, Mr. Albright, testified that some time in 1937, after he moved into his new house in June—

The Court: I remember that testimony. However, counsel, I feel this way: I am almost constitutionally opposed to granting nonsuits. I would rather pass on the case after the evidence is in. It is dangerous to all parties, whether there is a prima facie case or not. It may be a close point, but I prefer to hear the evidence.

Mr. Victor Cogen: I am perfectly satisfied, your Honor.

The Court: I think, as long as it is this time we will adjourn until tomorrow morning at 10 o'clock. How long will it take to put on your case?

(Testimony of Maurice Kahn.)

Mr. Joseph Cogen: I don't think it will take more than an hour, your Honor. Of course, I can't tell how long the cross examination will be.

The Court: We will take a recess until 10 o'clock tomorrow morning.

(An adjournment was taken until Wednesday, October 15, 1941, at 10 o'clock a. m.) [157]

Los Angeles, California, Wednesday, October 15,
1941, 10 a. m.

The Court: Proceed.

Mr. Joseph Cogen: If the court please, for the purpose of convenience I would like to put on two or three witnesses out of order, that are employes of various banks, and let them go.

The Court: Proceed.

WESLEY TAMBLYN,

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Wesley Tamblyn.

Direct Examination

Q. By Mr. Joseph Cogen: Are you employed at the California Bank, Market and Produce Branch?

(Testimony of Wesley Tamblyn.)

A. Yes, sir.

Q. As an employe there do you have access to the records of the bank? A. Yes, sir.

Q. Do you have records of cashier's checks that are purchased at your bank? A. Yes, sir.

Q. Were you asked to look through your records to see [158] if you had a cashier's check bought and purchased by Ivan Polakof? A. Yes, sir.

Q. Did you find one? A. Yes, sir.

Q. Have you that check here? A. Yes, sir.

Q. Was this purchased at your bank of June 6, 1939? A. Yes, sir.

Q. Who was it purchased by?

A. Ivan Polakof.

Q. And this check is known as California Bank, Market and Produce office, cashier's check No. 11-100250? A. That is right.

Q. And is in the sum of \$1,039.40?

A. Correct.

Mr. Joseph Cogen: Your Honor, I want to let the bank take its check——

The Court: Read it into the record.

Mr. Joseph Cogen: The check is made payable to A. Fratkin, and is signed by W.—

The Witness: No; that is D. K. Kane.

Mr. Victor Cogen: D. K. Kane, who is branch manager of the market and produce branch of the California Bank; is that right?

A. That is right. [159]

Q. And this check is endorsed on the back by—

(Testimony of Wesley Tamblyn.)

A. The payee, A. Fratkin.

Q. And was paid on what date?

A. June 9th.

Q. June 9, 1939? A. That is right.

The Court: Your record shows that was purchased by Ivan Polakof? A. That is right.

Mr. Joseph Cogen: That is all, your Honor.

Cross Examination

Q. By Mr. Hindin: Do you have your record with you to show by whom that check was purchased? A. Yes.

Q. May I see that, please? A. Yes, sir.

Q. I notice on this instrument, entitled, "Exchange, California Bank," dated June 6, 1939, your number 11-100250, that there is the name "Polakof", with a break, and Ivan "Polakof". Does that have any particular significance?

A. No; not all. Just—

Mr. Joseph Cogen: Speak a little louder, please.

A. No; that wouldn't have any significance. I myself wrote "Polakof" here.

Q. By Mr. Hindin: Did you yourself make this? A. Yes. [160]

Q. Do you know how this check was purchased: was it paid for by Ivan in cash or a check to your bank?

A. That I can't say.

Q. Does your record reveal that?

A. No, it wouldn't.

(Testimony of Wesley Tamblyn.)

Q. Did Ivan Polakof have a commercial account in your bank at that time?

A. Yes; he did.

Q. Did he have sufficient in that commercial account, do you know, to cover the check, or were there additions made to that account?

A. No; I don't believe his balance would come—

Mr. Joseph Cogen: Your Honor, we will stipulate it wasn't taken out of the commercial account at that time.

Q. By Mr. Hindin: You have no record, then, as to how this check was purchased? A. No.

Q. Whether it was with a check of some one else, or cash.

A. That I don't know.

Q. Do you recall whether Mr. Ivan Polakof appeared at your bank alone or with some one else at the time this check was purchased?

G A. No; I don't remember whether he was with anyone or not.

Q. In other words, the only record of this transaction [161] is this document?

A. That is all.

Mr. Hindin: That is all.

Mr. Joseph Cogen: That is all, Mr. Tamblyn.

[162]

RAYMOND ENGELL,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Raymond Engell.

Direct Examination

Q. By Mr. Joseph Cogen: Are you employed by the Bank of America? A. I am.

Q. What branch?

A. Jefferson and Vermont.

Q. What is your capacity there?

A. Assistant cashier.

Q. Were you asked to bring the escrow records No. 379 of said branch to this court?

A. Yes, sir.

Q. Did you bring them? A. I did.

Q. Does this escrow cover a transaction of some real property located at 1237-39 Riverside Drive?

A. I am not familiar with the property.

Mr. Hindin: Do you have the legal description of that property there?

Mr. Joseph Cogen: I am just looking for it. Here it is. It is 1937 Riverside Drive?

A. Yes. [163]

Q. Did your bank handle an escrow on or about June 1, 1939? A. They did.

Q. And in that escrow did you pay out to the California Bank the sum of \$1,939.23?

A. Yes; that is right.

Q. Did you pay out to Ivan Polakof the sum of \$2,070.60? A. Yes, sir.

(Testimony of Raymond Engell.)

Q. And that escrow was handled with one William H. Rivkin and Anna Rivkin, as grantees, and Ivan Polakof as grantor? A. Yes, it was.

Mr. Joseph Cogen: For the same reason I wish to have these records kept in the bank's hands, your Honor.

The Court: All right.

Mr. Joseph Cogen: That is all.

Cross Examination

Q. By Mr. Hindin: What is the legal description of that property that was sold or transferred?

A. Lots 7 and 8, Block 15, Tract 5635, Book 60, Page 49, Los Angeles County records.

Mr. Victor Cogen: I wonder, Mr. Witness, if you would repeat that?

A. Lots 7 and 8, in Block 15, Tract 5635, City and County of Los Angeles, recorded in Book 60, Page 49 of Maps.

Q. By Mr. Hindin: Who was the grantor in that [164] transaction? A. Ivan Polakof.

Q. Who was the grantee?

A. William H. and Anna Rivkin.

Q. And the total consideration for that property was how much? A. Let me see. \$4500.

Q. Of which sum \$1939 was instructed to be paid to the California Bank? A. Yes, sir.

Q. And the balance of \$2,070.60 was instructed to be paid to Ivan Polakof? A. Yes, sir.

Q. Did you bring down title on that property?

(Testimony of Raymond Engell.)

A. I notice that there has been a title policy called for. If it was issued, I don't know, but I do notice in here that there is a preliminary report on it. I will tell you definitely if I can just thumb through here a minute. Yes, sir: there was a title policy brought down. The only record I have here of it is the bill from the title company.

Q. What was the date of the closing of that escrow, that is, the date that these various funds were paid over?

A. On June 12th—pardon me just a minute. I had better check that. June 16th.

Q. That is 1939? [165] A. Yes, sir.

Mr. Hindin: That is all.

Mr. Joseph Cogen: May the witness be excused, your Honor?

The Court: Yes.

Mr. Joseph Cogen: I have one other witness coming from the California Bank, the home office. I hope to put him on as soon as he comes in, your Honor.

The Court: All right. Proceed. [166]

MARVIN POLAKOF.

having been heretofore sworn, was called as a witness on behalf of defendants.

Direct Examination

Q. By Mr. Joseph Cogen: Mr. Polakof, you have already testified, I believe, that you received

(Testimony of Marvin Polakof.)

a letter from Ivan Polakof requesting you to sign the deed and return it to him?

A. That is right.

Q. How long did it take you, between the time you received that deed, to sign it before a notary and return it to Mr. Ivan Polakof?

A. All within a period of half an hour. I received the letter, took the paper right to the bank, had it notarized and sent it right back, all within half an hour's time.

Q. That is, you mailed it immediately to Ivan Polakof?

A. That is right.

Q. From December, 1935, until the present time did you ever exercise any control over the property?

A. I never did.

Q. Did you manage the rental of the property?

A. No, I did not.

Q. To your knowledge did you pay any taxes?

A. No; I did not.

Q. Outside of having the title in your name did you [167] exercise any rights of ownership?

A. I exercised no rights of ownership.

Q. How much money did you personally pay for the property?

A. I paid no money for the property.

Q. Did you pay any money at all in April, 1939?

A. I paid nothing.

Q. In June, 1939?

A. I paid nothing.

Q. In December, 1935?

A. Nothing.

Q. Did you give to any of your creditors a statement that you owned any property out in Baldwin Park?

(Testimony of Marvin Polakof.)

A. Never. I never considered it my property. Therefore, I never gave them any such statement.

Q. I refer specifically to the Royal Jewellery Company. Did you tell them that you owned the property? A. I did not.

Q. Did you tell May Company that you owned the property? A. I did not.

Q. Did you ever tell Mr. Walther, the attorney, that you owned the property? A. I did not.

Q. Did you ever tell Acampo Winery of Lodi, California, that you owned the property?

A. No. [168]

Q. Did you, up to January of 1940, issue any financial statements to creditors to obtain credit for the business, which contained a provision that you were the owner of the Baldwin Park property?

A. No.

Q. During the four or five years from 1934 on, the business was doing as much as four, five or six thousand dollars sales per month, or more?

A. You would have to check that, to be accurate, with the bookkeeper.

Q. But that is about right?

A. Approximately.

Mr. Joseph Cogen: That is all.

Cross Examination

Q. By Mr. Hindin: Mr. Polakof, was there any reason for your great haste in sending back this deed to your brother when you received it?

(Testimony of Marvin Polakof.)

A. Well, I like to do things right now and, therefore, I sent it back right away.

Q. Now, Mr. Polakof, prior to this time or prior to the time that you went to the middle west, you had given your father a power of attorney, hadn't you?

The Court: That has been gone into, counsel. He was asked about that.

Q. By Mr. Hindin: Let me ask you this: You said you never exercised any management of this property. Who [169] did manage it?

A. My brother managed it.

Q. Did your father ever manage it?

A. He may have.

Q. As a matter of fact, then, you didn't care who managed it; is that correct?

A. Why, it was never my property.

Q. I see. Now, in 1938 do you recall receiving a quit-claim deed, covering this property, from Mr. Crosby, Mr. Kendall and Mr. Newhouse?

A. No.

Q. I show you a certified copy of a deed and ask you if you have seen that before.

A. To my knowledge I have never seen this paper before.

Mr. Hindin: I offer this in evidence as plaintiff's exhibit next in order.

The Court: It may be received.

The Clerk: Exhibit 12.

(Testimony of Marvin Polakof.)

PLAINTIFF'S EXHIBIT 12

QUITCLAIM DEED

In consideration of \$10.00, receipt of which is hereby acknowledged, I/We, C. E. Crosby, H. C. Kendall, and Frank Newhouse, do hereby quitclaim to Marvin Polakof, all that real property in the County of Los Angeles, State of California, described as:

That portion of Southwest quarter of Section 4, Township 1 South, Range 10 West, S.B. &M., in the County of Los Angeles, State of California, described as follows:

Beginning at a point distant North $1^{\circ} 16' 30''$ East 660 feet from the South line of said quarter Section, and distant North $89^{\circ} 54' 15''$ West 1340 feet from the East line of said quarter Section as said lines are shown on a map of Puente and Azusa Bridge Road, recorded in Book 3842, Page 6 et seq., of Deeds, Records of said County; thence North $89^{\circ} 54' 15''$ West parallel with the South line of said quarter Section 330 feet, thence North $1^{\circ} 16' 30''$ East, parallel with the East line of said quarter section 660 feet, thence South $89^{\circ} 54' 15''$ East 330 feet; thence South $1^{\circ} 16' 30''$ West 660 feet to the point of beginning. Excepting therefrom a 30 foot strip along the North, South, East and West sides for street purposes, including a factory building located thereon.

(Testimony of Marvin Polakof.)

Witness our hands this day of,
1938.

C. E. CROSBY

(C. E. Crosby)

H. C. KENDALL

(H. C. Kendall)

FRANK F. NEWHOUSE

(Frank Newhouse)

State of California,

County of Los Angeles—ss.

On this 12th day of July, 1938, before me, Julia Vanderlic, a Notary Public in and for said County, personally appeared C. E. Crosby & H. C. Kendall, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

JULIA VANDERLIC,

Notary Public in and for said County and State.

My Commission expires Sept. 2, 1940.

(Notarial Seal of

Mrs. Julia Vanderlic)

State of California,

County of Los Angeles—ss.

On this 22nd day of July, in the year one thousand nine hundred and thirty-eight, before me, Joseph J. Bellito, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, per-

(Testimony of Marvin Polakof.)

sonally appeared Frank Newhouse, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in the L.A. County of Los Angeles, the day and year in this certificate first above written.

(Notarial Seal) JOSEPH J. BELLITO,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 9, 1941.

#1007 Copy of original recorded at request of Grantee, Aug. 5, 1938, 12:12 P.M.

Copyist #117, Compared, R. L. Hazen, County Recorder, By N. E. Woodel, (39) Deputy.

Q. By Mr. Hindin: Do you know who signed the papers for the lease of this property during this period that it was in your name?

A. I believe it was brought out in court that my father signed that lease.

Q. Did you know he was negotiating for this lease?

A. I had no interest whether he negotiated or not.

The Court: You haven't answered the question.

[170]

A. No, sir.

(Testimony of Marvin Polakof.)

Q. By Mr. Hindin: You didn't know?

A. I didn't know.

Q. Where were you living at that time, at home?

A. Yes, sir.

The Court: With your father?

A. Yes, sir.

The Court: And your father was dealing with this property and you didn't even know he was working on a lease?

A. That is right. You see, I was working in the attorney's office and going to law school, and my interest was taken up in study, knowing that when I got out of law school I would have the business to carry me through and start in the law practice that was always available. I had every confidence in my father's management.

The Court: Did your brother live at home, too?

A. Yes, sir.

The Court: You all lived at home?

A. Yes, sir.

The Court: You did, shortly after the execution of this deed, get married?

A. Well, you see, I went back to Omaha originally to get married to a young lady, but I married another young lady there, and in the interim I came back and then I went back again.

The Court: Referring to this jewelry you bought, [171] was that the wedding ring?

A. Yes, sir.

The Court: Was that the ring you used?

A. Yes, sir. It only lasted for ten months.

(Testimony of Marvin Polakof.)

The Court: That is the ring you bought?

A. Yes, sir. I never intended to defraud them. I always intended to pay.

The Court: You never have, though, have you?

A. I paid all but \$25 of it.

The Court: That is how many years now?

A. I don't recall right now. It may be a year and a half or two years; something like that.

The Court: You haven't paid for the suit you wore out?

A. No; on that particular suit, I was never satisfied with it. I brought it back for adjustments.

The Court: Well, the wedding ring didn't turn out very satisfactorily. Is that the reason you didn't pay for it?

A. Well, that isn't the real reason.

The Court: I will say frankly, gentlemen, a man who can't pay for his wedding ring doesn't stand in very good grace before this court.

Mr. Victor Cogen: I might observe, your Honor, that there have been payments made more or less continually since the wedding ring was purchased. Although the payments were small, they have been paid. [172]

The Court: It doesn't set very good. It is nothing to be proud of.

Mr. Victor Cogen: No; I will grant you that.

The Court: A man in business that has failed, that is a different picture; but a man who fails to pay for the clothes he has worn and a wedding ring he has bought, the court doesn't think much of him

(Testimony of Marvin Polakof.)

or his testimony. You may proceed.

Mr. Hindin: Just one more question.

Q. After the 24th day of April, 1939 did you receive a reconveyance on this property, executed by the Title Insurance & Trust Company, do you recall? A. What was it, a title?

Q. A full reconveyance?

A. Is that from Mr. Fratkin, or myself—to myself?

Q. I show you a full reconveyance, a certified copy of a full reconveyance from the Title Insurance & Trust Company, as trustee, covering the property, which included a deed of trust in which Marvin Polakof—that is yourself—was the trustor, made May 15, 1936, and this reconveyance was executed June 2, 1939. I ask you if you have ever seen that before.

A. I couldn't tell without the balance of it.

Q. This is the entire reconveyance as it appears of record.

Mr. Victor Cogen: Well, counsel, there are reconveyances [173] always given to the parties that pay off the loan, and it doesn't make any difference——

The Court: Let him answer the question. He can answer the question whether he has seen it before or not.

A. I may have seen it. At this time I don't recall.

Mr. Hindin: I offer it as plaintiff's exhibit in evidence.

(Testimony of Marvin Polakof.)

The Court: Received.

The Clerk: Exhibit 13.

PLAINTIFF'S EXHIBIT 13

1630600-Winfield.

Full Reconveyance.

Title Insurance and Trust Company, a California corporation, as Trustee under Deed of Trust, dated May 15th, 1936, made by Marvin Polakof, Trustor, and recorded as Instrument No. 895, on May 18th, 1936, in Book 14174, Page 71 of Official Records in the office of the Recorder of Los Angeles County, California, having received from holder of the obligations thereunder a written request to reconvey, reciting that all sums secured by said Deed of Trust have been fully paid, and said Deed of Trust and the note or notes secured thereby having been surrendered to said Trustee for cancellation, does hereby Reconvey, without warranty, to the person or persons legally entitled thereto, the estate now held by it thereunder. In Witness Whereof, Title Insurance and Trust Company, as Trustee, has caused its corporate name and seal to be hereto affixed by its Assistant Secretary, thereunto duly authorized, this 2nd day of June, 1939.

(Corporate Seal)

HEM TITLE INSURANCE AND
TRUST COMPANY.

As Trustee.

By R. GEORGE SCOTT,

Assistant Secretary.

(Testimony of Marvin Polakof.)

State of California,

County of Los Angeles—ss.

On June 2nd, 1939, before me, the undersigned, a Notary Public in and for said County, personally appeared R. George Scott, known to me to be the Assistant Secretary of Title Insurance and Trust Company, the corporation that executed the foregoing instrument as Trustee, and known to me to be the person who executed said instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same as Trustee. Witness my hand and official seal.

(Notarial Seal)

HAZEL KELLOGG,

Notary Public in and for said County and State.
No.R-00101.

#66. Copy of original recorded at request of Title Ins. & Tr. Co., June 26, 1939, 8:30 A. M. Copyist #101. Compared, Mame B. Beatty, County Recorder, by H. Kirkland (139) Deputy.
\$1.00-4. B.

Mr. Hindin: Now, just one more question, Mr. Polakof. You testified that you studied law, didn't you? A. Yes.

Q. Did you study the subject of real property law? A. No; I haven't got that far.

Q. You didn't get that far? A. No.

(Testimony of Marvin Polakof.)

Q. Did you study the subject of recordation?

A. No.

Q. Did you study the subject of equity?

A. No.

Q. Did you study the subject of contracts?

A. I just had the first part of contracts.

Q. How many years' law school did you say you had studied?

A. About two years pre-legal and one year of law.

Mr. Hindin: That is all.

Mr. Joseph Cogen: That is all. [174]

RICHARD C. CORBERLY,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Richard C. Corberly.

Direct Examination

Q. By Joseph Cogen: Mr. Corberly, are you employed by the California Bank home office, in the real estate loan department? A. Yes, sir.

Q. Were you asked to bring to this court records of payments on property that you made a loan on?

A. Yes, sir.

Q. Is that property held in your company's files as owned by Ivan Polakof?

A. Well, I will have——

(Testimony of Richard C. Corberly.)

Q. How is it carried on the ledger card?

A. The ledger card is Ivan Polakof. It does not disclose what the security is. I think I have the title company paper here.

Q. Do you have the title papers?

A. I believe so.

Q. Will you please read the legal description on that title paper?

A. Lots 7 and 8, Block 15 of Tract 5635, City and County of Los Angeles, State of California. Do you want [175] the full legal——

Q. Just as much as is down there.

A. As per maps recorded in Book 60, Page 49 of Maps in the office of the county recorder of said county.

Q. And this property, the title is in the name of whom?

A. As of October 7, 1936, the Title Insurance & Trust Company certified it or states that it is in the name of Ivan Polakof, a single man.

Q. And at that time did he make a loan at your bank?

A. Yes. Of course, I don't have the deed of trust, but the notes, according to our records, were dated September 5, 1936, in the amount of \$3,000, and an additional loan was made May 9, 1939, in the amount of \$1,000.

Q. Was that loan ever paid off?

A. Both loans were paid in full on June 17, 1939.

(Testimony of Richard C. Corberly.)

Q. And what was the date of the additional loan? A. May 9, 1939.

Q. How much was that? A. \$1,000.

Q. To whom was that made?

A. Well, the note was signed by Ivan Polakof.

Q. Do you have any knowledge or any showing to whom that money went?

A. I don't know. I don't know what is in here. Up until now I haven't reviewed this file.

Q. Wasn't the signer or maker of the note Ivan Polakof? [176] A. That is correct.

Q. I think that is sufficient. You have a certified copy of the ledger cards?

A. It has not been certified by——

Q. I mean, a photostatic copy? A. Yes.

Q. Are these the photostatic copies?

A. Yes.

Q. I thought you had something else here?

A. I had a negative, was all. These are the negative prints from which those were printed.

Mr. Joseph Cogen: May this be admitted as defendant Ivan Polakof's exhibit?

Mr. Hindin: May we see that first?

Mr. Joseph Cogen: Yes.

The Court: Received.

The Clerk: Exhibit B.

(Testimony of Richard C. Corberly.)

Mr. Hindin: Are you through examining the witness?

Mr. Joseph Cogen: Yes.

Cross Examination

Q. By Mr. Hindin: Mr. Corberly, this record that has just been introduced into evidence shows a series of monthly payments, does it not?

A. Yes, sir.

Q. And the original contract or the original mortgage and trust deed called for the principal sum of \$3,000; [177] is that correct?

A. That is right.

Q. Now, from this card can you tell us how those monthly payments were made; how much was paid on principal and how much was paid on interest from the start?

A. Well, do you want me to read these payments?

Q. Let me ask you this: Were the monthly payments made regularly, according to your register?

The Court: Is that a copy that is in evidence?

Mr. Hindin: Yes.

The Court: It speaks for itself.

Mr. Hindin: All right.

Q. When the second loan was made of \$1,000, can you tell us from your register here what the balance unpaid was on the original loan?

A. Well, the second loan or the additional loan was made May 9, 1939, and there was a payment on the main note on the same date, so the balance as of

(Testimony of Richard C. Corberly.)

the close of business as of that day was \$965.22 plus the \$1,000 additional loan.

Q. In other words, a \$3,000 obligation had been paid down to \$900 and a new loan of \$1,000 made on that day; is that correct?

A. That is correct. In going through the file I see a copy of an exchange requisition for \$909.20 on May 23, 1939, which would have ordered a cashier's check in favor of Ivan Polakof. The difference in indebtedness is made [178] up by loan, expenses, and probably the payment on this—this \$75 payment that was made on that day.

Q. I see.

Q. By Mr. Joseph Cogen: How much was that for? A. \$909.20.

The Court: Any further questions?

Mr. Hindin: I have no further questions.

The Court: That is all.

Mr. Joseph Cogen: May the witness be excused?

Mr. Hindin: Yes.

Mr. Victor Cogen: I wonder if the witness testified what date that loan was paid off?

The Court: I don't think it makes any difference. The Bank of America records show that loan was paid off. The property was clear.

Mr. Hindin: June 17, 1939.

The Court: Call your next witness. [179]

IVAN POLAKOF,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Ivan Polakof.

Direct Examination

Q. By Mr. Joseph Cogen: Mr. Polakof, did you on or about the 7th of June, 1939, pay an encumbrance on the Baldwin Park property of \$1,000 to Mr. Fratkin?

A. I did.

Q. Will you explain to the court the transactions that took place and how you raised that money?

A. As already explained, I had an original loan at the main office of the California Bank for \$3,000, which I paid down to around \$800; and then when I had to raise that \$1,000, also on the same security the bank gave me an additional thousand dollars to pay Mr. Fratkin.

Q. Who owned that property and where was it located?

A. The property? I owned the property. The property was located on Riverside Drive.

Q. How did you acquire that property?

A. That was a gift from my grandfather.

Q. About how long before that?

A. About four years before.

Q. Before 1939? A. That is right. [180]

Q. You may continue with the transaction.

(Testimony of Ivan Polakof.)

A. And I then owed the bank some \$1900. I sold the property and through the escrow they paid off the loan to the California Bank and I received some \$2700 as a balance of the sale price of \$4,500.

Q. Was that \$2700 or \$2070?

A. It was around \$2,000. \$2,070. If I had a pencil and paper I could figure it. It was in escrow there.

Q. About what time was that?

The Court: The record speaks for itself as to the transaction.

Mr. Joseph Cogen: Yes; it does, your Honor.

Q. I show you a check and ask you if that is your signature thereon. A. That is.

Q. That check is drawn on the Market and Produce branch of the California Bank?

A. That is right.

Q. In the sum of \$155.20? A. Right.

Q. And dated June 7, 1939?

A. That is right.

Q. And on one corner of this check is written the word "Fratkin"? A. That is right.

Q. And on the reverse side of this check, on the back, [181] is number 11-100251? A. Right.

Q. You were in court this morning when a cashier's check in the sum of \$1039.40 was read to the court? A. That is right?

Q. And it had numbers somewhat similar to the numbers I have just read on the reverse side of this check? A. That is right.

(Testimony of Ivan Polakof.)

Q. Do you know the circumstances of the payment of this check to the California Bank?

A. I do.

Q. Will you explain it?

A. When I applied for the loan of \$1,000 I was short \$155.20, because the bank only gave me nine hundred and some odd dollars, and Mr. Kane, the manager, called me over and said that in order to make a thousand dollars I would have to add \$155.20, and I gave him my check. That made the total with which I bought a cashier's check to Mr. Fratkin to pay off my obligation to him.

Q. As a matter of fact, it was a few dollars more than a thousand dollars?

A. \$32 more, to be exact.

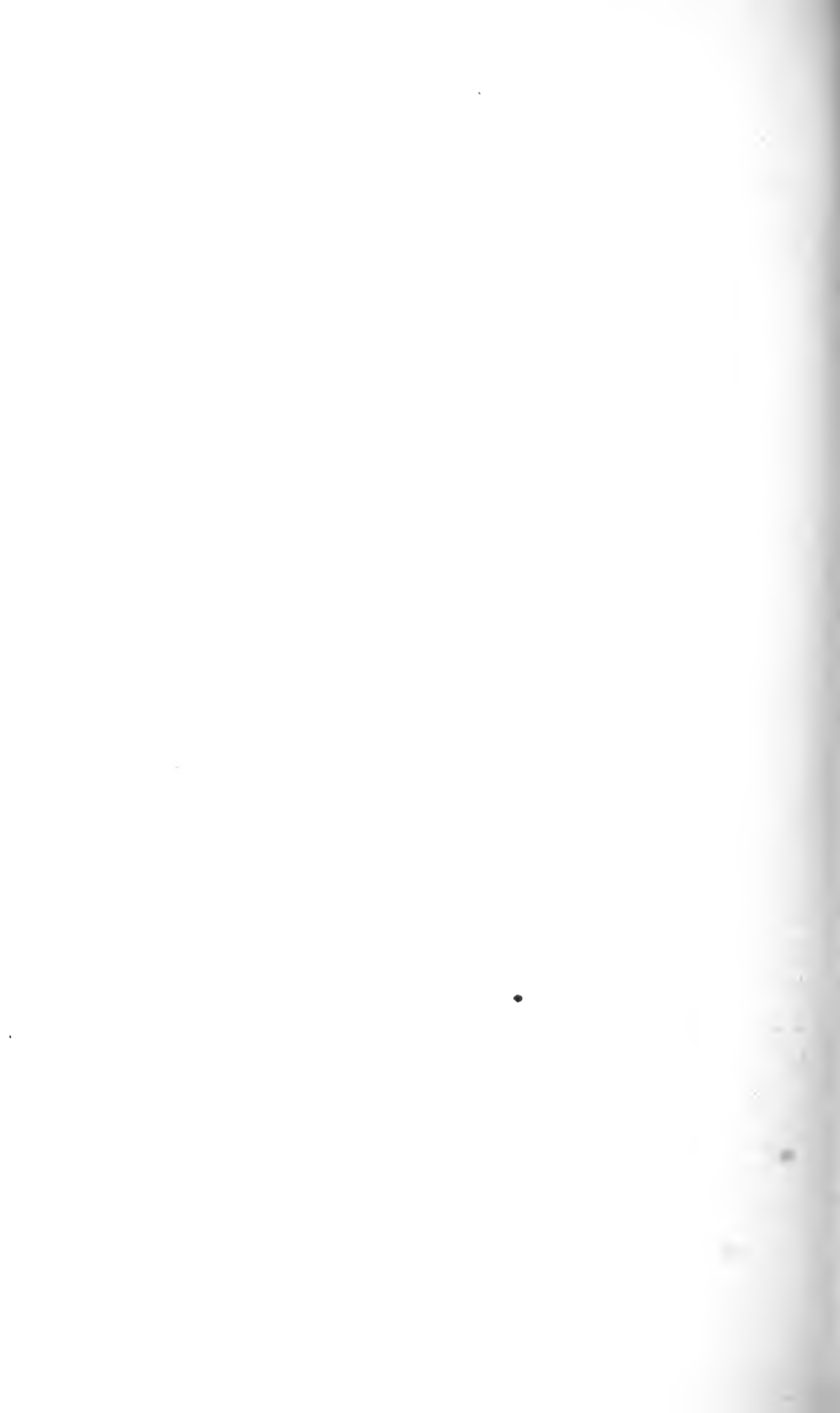
Q. I believe it was \$39.40, to be exact.

Mr. Joseph Cogen: May this be defendant Ivan Polakof's exhibit?

Mr. Hindin: I will object to the introduction of this [182] if the Court please, on the ground that the payee of the check appears to be the California Bank, and that any connection that it may have with a Mr. Fratkin in this transaction is not shown by the record.

The Court: Objection overruled.

The Clerk: Exhibit C.





MARKET AND PRODUCE OFFICE

No. _____

California Bank 16-166
COMMERCIAL 801 SOUTH CENTRE AVENUE SAVINGS

Los Angeles, Cal. 6-7

1939

Pay to the
order of

California Bank

\$155.26

One Hundred and Fifty Five and 26/100

Dollars

11

A. J. Owen, Cashier

Dear Sir

11-100251-50

• • • • •

• • • • •

1532-184-61

Relief of 21

Oct 15 1941

11/21/41



(Testimony of Ivan Polakof.)

Q. By Mr. Joseph Cogen: Do you recall the facts involving the Baldwin Park property, or property designated and known as Baldwin Park property, on or about the latter part of the year 1935? A. Yes.

Q. Did you at that time arrange for the purchase of that property? A. I did.

Q. In whose name was that property placed at that time?

A. At that time it was placed in Marvin Polakof's name.

Q. Did Marvin Polakof put up any money for the purchase of that property? A. No.

The Court: Why did you put it in Marvin's name?

A. My father came to me and told me of the sale of this property in the court. I wasn't very interested, because I expected to go east to school. He convinced me it was a good one, so I raised \$1300 and I said, "Put it in Marvin's name, because I am going east." And I expected a quick sale, and I was buying it with Mr. Fratkin for a [183] quick sale. And I said, "Go ahead and let Marvin sign for it, because I don't want to be bothered with it. I want to go east to school." And I went east and I came back, and Mr. Fratkin decided to sell me his interest. This transaction is how I paid Mr. Fratkin off. But when I decided I was going to own the property myself I sent this deed to Marvin to sign, so I could bring down the ownership.

(Testimony of Ivan Polakof.)

The Court: Why did you hold the deed so long?

A. Because I was advised I didn't have to record the deed.

The Court: Who advised you?

A. Mr. Albright. He said he knew many cases where you just hold the deed until you are ready to bring down the certificate of title. And I followed his advice and brought down the certificate of title in 18 months and before any of this trouble existed. That was before this bankruptcy. It was in my name, the certificate of title, the recordation and all, before any of this trouble came up. And I didn't anticipate my father passing away and my brother taking on another party, so I don't believe I took it out of his name to cheat anyone.

Q. By Mr. Joseph Cogen: I show you a policy of title insurance with the Title Insurance & Trust Company of Los Angeles, California, designated Policy No. 1,630,600, and ask you if you have ever seen this policy of title insurance before. [184]

A. Yes.

Q. Is that policy of title insurance dated the 26th day of June, 1939? A. It is.

Q. Does it cover the property known as the Baldwin Park property? A. It does.

Q. Does this legal description, which starts out, "That portion of the southwest quarter," and so forth, cover the Baldwin Park property?

A. Yes, sir.

Q. Are you designated as the owner?

(Testimony of Ivan Polakof.)

A. I am.

Q. And does it read, paragraph 1, as follows: "The title to said land is, at the date hereof, vested in Ivan Polakof." And dated August 27, 1937? A. Right.

Q. Was this policy of title insurance drawn up at your request by the title company?

A. It was.

Q. Subsequent to the payment of the thousand dollars? A. Right.

Q. I show you Plaintiff's Exhibit 13, which has previously been described as a full reconveyance. Was this reconveyance intended as a reconveyance——

The Court: It speaks for itself. [185]

Mr. Joseph Cogen: I don't think it refers to the legal description, your Honor.

Mr. Victor Cogen: If you are willing to stipulate that it refers to that thousand-dollar trust deed that was given to Mr. Fratkin——

Mr. Joseph Cogen: Just a minute. I think I am wrong, your Honor. It was made by Mr. Brody.

Q. Who prepared it?

A. This was prepared in his office, and recorded.

Mr. Joseph Cogen: Will you stipulate that the property involved a reconveyance of that \$1,000 trust deed?

Mr. Hindin: If that is what the record shows.

Mr. Victor Cogen: Well, let's compare it.

The Court: Proceed, gentlemen. You are spending time on a lot of matters that are immaterial

(Testimony of Ivan Polakof.)

until there is some evidence to the contrary. This shows that this man paid off a thousand-dollar loan. You are spending too much time on it.

Mr. Joseph Cogen: The only reason I brought this in is that the plaintiff mentioned it in examining Marvin Polakof, and he knew nothing about it.

The Court: That wouldn't make any difference.

Q. By Mr. Joseph Cogen: You testified, I believe, that you raised \$1300 at that time to pay for the property? A. That is right.

Q. And that was for all the property or half the [186] property or a third, or what?

A. One-half of the property.

The Court: \$1300 in cash?

A. Right. The property was sold for around \$2600 at a court sale. Mr. Fratkin paid half and I paid half. That is how——

The Court: I thought there was a loan on the property; that money was borrowed to pay for that?

A. No, sir. The loan was made on the Riverside Drive property. I didn't put any loan at all on the property.

The Court: Where did you get the \$1300?

A. I had \$800, and \$300 borrowed from my uncle Rudy. And when my father went to court we didn't think it was going to go \$1300, and he advanced \$200 of his money.

Q. By Mr. Joseph Cogen: Before this time were you in business for yourself or with any company?

(Testimony of Ivan Polakof.)

A. Yes. I started the wine business. I was in the wine business.

Q. Were you connected with the Monte Christo Winery? A. I was.

Q. Did you make considerable money out of that transaction?

Mr. Hindin: I object to that as incompetent, irrelevant and immaterial.

The Court: Well, it is an indefinite term, anyhow. He has made an explanation of his money. He said he borrow- [187] ed \$800 of it.

A. No. I had \$800. I borrowed \$300.

Q. Where did you borrow the \$300?

A. From an uncle.

The Court: Your brother didn't loan you any money in this? A. No, sir.

The Court: Proceed.

Q. By Mr. Joseph Cogen: Within two years preceding that time didn't you make \$10,000 in one winery deal?

A. I did, and I paid income tax on \$8,000 of it.

Mr. Hindin: I move that last part be stricken as not responsive, and immaterial.

The Court: Objection overruled.

Q. By Mr. Joseph Cogen: After you received the deed from Marvin did you exercise exclusive control over that property from that date to date?

A. I had always exercised control over that property.

Q. Did you pay taxes on that property?

(Testimony of Ivan Polakof.)

A. I paid taxes on the property.

The Court: What was your occupation at the time you bought this property?

A. I was a pharmacist and working in the wine business. I originally started the Ace Distributing Company, after I left the Monte Christo Vintage Company.

The Court: What is your occupation now? [188]

A. A wine chemist at a very large winery at Escalante California. I am trying to go back to school.

Q. By Mr. Joseph Cogen: Weren't you also with the Southern California Winery?

A. I was. I was with the Southern California Winery for at least a year.

The Court: Do all wineries put out the same grade of wine under different brands——

A. That is a trade secret.

The Court: ——the same as the Ace did?

A. I wouldn't be a party to that.

The Court: The Ace, as I understand, was putting out three different brands of wine, all the same grade.

Mr. Joseph Cogen: I think the witness said it is a trade secret, your Honor. I think they do have a vintage wine.

The Witness: They do.

Mr. Victor Cogen: I think Mr. Ehrlich's father could tell more about the wine business.

The Witness: Yes; we have a wine expert right here.

(Testimony of Ivan Polakof.)

Mr. Victor Cogen: It is Mr. Ehrlich's father.

Mr. Ehrlich: Does your Honor want an expert opinion? It isn't done by legitimate houses; I will say that.

The Court: It isn't part of the case, anyhow.

Q. By Mr. Joseph Cogen: I show you four checks. Are these all signed by you? [189]

A. Yes.

Q. Were these used to pay taxes on the Baldwin Park property? A. They were.

Q. I call your attention to one specific check, which check appears to be dated December 4, 1939, and on the reverse side it says, "Baldwin Park"—

The Court: Who is this made payable to?

Mr. Joseph Cogen: The county recorder.

The Court: The county recorder?

Mr. Joseph Cogen: And one to H. L. Byram, county tax collector. And J. W. Bachelor, tax collector.

The Court: What is J. W. Bachelor?

A. He changed places, I think.

The Court: No. J. W. Bachelor is tax collector of San Bernardino County.

Q. By Mr. Joseph Cogen: Did you have property in San Bernardino County?

A. Yes. In San Bernardino Canyon. That is a little cabin I had there. It states right on here, "San Bernardino County."

The Court: That hasn't anything to do with this.

(Testimony of Ivan Polakof.)

Mr. Joseph Cogen: No. I will remove that. In fact, it was cashed in San Bernardino.

The Court: Give me the three checks that you are trying to introduce. [190]

Mr. Ehrlich: Your Honor, I inspected them, and only one that Mr. Cogen has in his hand is material. He hasn't identified the others as pertaining to this particular piece and parcel of property.

The Court: There is only one; the check that indicates it is Baldwin Park property.

Mr. Joseph Cogen: Yes; one specific check indicates that.

The Court: I think that is the only one that is admissible. He can testify whether he paid the taxes on it.

Q. By Mr. Joseph Cogen: Did you pay the taxes on the property?

A. The first year the building was leased the True-X Chemical Company paid the taxes on the property.

Q. And after the first year?

A. I paid the taxes.

Q. You personally paid the taxes?

A. That is right.

Mr. Joseph Cogen: May the check dated December 4, 1939, to H. L. Byram, county tax collector, in the sum of \$80.91 be admitted as Ivan Polakof's next exhibit?

The Court: Admitted.

The Clerk: Exhibit D.

MARKET AND PRODUCE OFFICE

California Bank

COMMERCIAL 801 SOUTH CENTRAL AVENUE SAVINGS

No.

798449

DEC 4 1939

Los Angeles, Cal.

H.L. Byram, County Tax Collector

\$80.91

---Eighty and 91/100---

Dollars

Dan Calvert

Pay to the order of

No. 723233 Vol. 131

PAY TO THE CREDIT OF
ANY BANK OR BANKER
Prior Endorsements Guaranteed
#DEC 21 1939
H. L. BYRAM
County Tax Collector
Los Angeles County Tax Collector

FIRST & SPYING BRANCH
SECURITY FIRST NATIONAL
BANK OF LOS ANGELES
16-55
DEC 23 1939
PAY TO THE ORDER OF
BANK OR BANKER
OR THROUGH
LOS ANGELES CLEARING HOUSE
First Endorsement Guaranteed
Security First National Bank
of Los Angeles 16-3

LS32-134 CW
Salattem, etc

Sub Exhibit
No. D

Filed OCT 15 1941

R. S. ZIMMERMAN, Sec.

By

Q. By Mr. Joseph Cogen: During the time you owned this property have you made any improvements on the property? A. I did. [191]

Q. Could you enumerate the improvements?

A. I could. Three partitions that I removed, so I could raise the roof. I had to brace the roof. That amounted to—it was under contract, on bracing the roof—\$310 for the contract, the amount. About \$70 for floor plans and permit from the county to do that work.

Q. Did you also pay for the water stock?

A. I did.

Q. How much was that?

A. \$500. That was payable \$50 a month and the moneys came from the rent of the lease to the True-X Chemical Company.

Q. Is that the same water stock—

The Court: That is sufficient, counsel. Let him bring it out on cross examination, if there is any question about that. We are spending too much time in details.

Q. By Mr. Joseph Cogen: Is that building in good condition at the present time?

A. No, sir. I have an estimate to repair the roof for \$1400. Otherwise, if the rains start now you couldn't keep a tenant in there at all. And that can be inspected at any time.

Q. Were you around the premises of the Ace Distributing Company at any time during December 1938 and January, 1939? A. Yes, sir.

(Testimony of Ivan Polakof.)

Q. Is that one of the periods that you were temporarily [192] working at the Ace?

A. Right.

Q. Who was the owner of the Ace Distributing Company? A. Marvin Polakof.

Q. Did anyone else represent themselves as the owner of that company? A. No, sir.

Q. To your knowledge?

A. To my knowledge.

Q. At that time were you acquainted or did you talk to anyone with reference to a transaction with the Acampo Winery?

A. Any particular transaction?

Q. I refer to the bottled wine transaction.

A. Yes; I did have a conversation with them on that.

Q. Who did you have the conversation with?

A. With Mr. Ventura and Mr. Gunther.

Q. Who is Mr. Gunther?

A. Mr. Gunther was at that time president of the Acampo Winery.

Mr. Hindin: We object to that on the ground that there is no proper foundation laid as to the agency. This man isn't competent to testify as to another man's work.

The Court: Objection sustained.

Mr. Joseph Cogen: Your Honor, for the purpose of [193] showing that Mr. Gunther was the president at that time, if I may go into that I can produce a witness, who is now in the court room——

(Testimony of Ivan Polakof.)

The Court: But the point is, this man hasn't any authority.

Mr. Joseph Cogen: This man hasn't any authority?

The Court: No.

Q. By Mr. Joseph Cogen: Who was present at that time?

A. I believe that—if the bookkeeper has the authority I believe the bookkeeper understands that transaction from the beginning—the case goods transaction.

Q. Was Marvin Polakof present?

A. I don't recall.

Q. Was Sam Polakof present?

A. Yes, sir.

Q. Sam Polakof was present? A. Yes, sir.

Q. Do you know what capacity Sam Polakof had with the Ace Distributing Company?

A. He was just managing it for Marvin Polakof.

Q. Did you overhear a conversation between Mr. Sam Polakof and Mr. Gunther and Mr. Henry Ventura? A. Yes.

Q. With reference to this bottled merchandise?

A. That is right.

Q. Would you tell the court what that conversation was? [194]

Mr. Hindin: We will object on the ground that it is irrelevant and immaterial, on the further

(Testimony of Ivan Polakof.)

ground that no proper foundation has been laid, on the further ground that the matter, if testified to, is not relevant and is hearsay as to the plaintiff in this matter.

The Court: You put on the bookkeeper of the winery to attempt to prove the delay in the payment of these bottled goods. Do you mean to say they can't bring any contradictory evidence in on that?

Mr. Hindin: Yes, your Honor. They can bring contradictory evidence provided it is competent.

The Court: I think it is as competent as the bookkeeper's testimony. I am going to admit it.

Mr. Ehrlich: Your Honor, we have no objection to the bookkeeper or an officer of the winery testifying as to that, but this man had no authority to bind the Ace Distributing Company or the creditors whom we represent.

The Court: Well, he said he overheard a conversation between his father and a representative of the winery. He is not repeating his own conversation. There is evidence here that the father, Sam Polakof, was acting as manager, and his authority isn't in dispute.

Mr. Hindin: I withdraw my objection.

Q. By Mr. Joseph Cogen: What was that conversation, as nearly as you can relate it?

A. Well, as nearly as I can relate, the Acampo Winery [195] asked the Ace Distributing Company to store this wine in their premises, so that they

(Testimony of Ivan Polakof.)

could send down salesmen to start a sales campaign. In fact, the Acampo Winery paid the salesmen direct. The salesmen went out and made sales, they took orders on sales blanks—on order blanks that stated, "Acampo Winery, Southern California Agent."

Mr. Hindin: We object to that on the ground that it is certainly incompetent, irrelevant and immaterial, and is hearsay with reference to any matters here, and is not a proper conversation. It is going into conclusions of this witness.

The Court: Yes. He is not answering the question.

Q. By Mr. Joseph Cogen: What was the conversation?

The Witness: I am sorry.

Mr. Hindin: In order that the record might be correct I move that last part be stricken.

The Court: That portion of the answer may be stricken.

The Witness: I am sorry.

The Court: Just tell what the conversation was; not what you saw.

A. The conversation was that this wine was to be stored in the Ace Distributing Company and that the Ace was never to be billed for it and never have to pay for it until some sort of settlement could be arranged to see how this wine was going, with the salesmen. If it went over they would pay

(Testimony of Ivan Polakof.)

for it; if it didn't, they wouldn't. And this wine [196] didn't go over.

Mr. Hindin: I move that last part be stricken.

The Court: Yes.

The Witness: I don't know how to——

The Court: Anyhow, it was to be brought there and they would put on a sales campaign?

A. Yes.

The Court: That was the substance of the conversation?

A. That was the substance of the conversation.

Q. By Mr. Joseph Cogen: Do you know the manner of payment of the Acampo Winery bills? Did they bill you directly or did they send trade acceptances?

The Court: I think that has been gone into.

Mr. Victor Cogen: The only purpose of that is to show——

The Court: Here is the proposition: It is a bill, a statement that has been approved in the bankruptcy proceedings and recognized as a claim. I am not going to try that claim over again.

Mr. Victor Cogen: I don't mean it that way.

The Court: You are just arguing about a lot of things that don't mean a thing, in my judgment.

Mr. Victor Cogen: May I make a statement?

The Court: Yes.

Mr. Victor Cogen: Every invoice had a trade acceptance, as shown by the testimony, except those invoices relating to bottled goods, and we want to

(Testimony of Ivan Polakof.)

show that that was handled [197] differently and that nothing was done until about a year later.

The Court: This man doesn't know about that. He wasn't working there, except occasionally.

Mr. Victor Cogen: All right, your Honor.

The Court: The bookkeeper has that information.

Mr. Victor Cogen: That is all.

Cross Examination

Q. By Mr. Hindin: When did you first receive this Lot 7 and 8 from your grandfather?

A. I would have to refer to the date on the deed. I don't recall the exact date. I know it was some years ago.

Q. Was your grandfather named Rena Polakof?

A. No; that was an aunt. That was my grandfather's daughter.

Q. And this property was in the name of Rena Polakof when you got it?

A. That is right.

Q. In other words, your grandfather had this daughter give it to you?

A. That is exactly right.

Q. Does this date refresh your recollection, July 7, 1932, as the date you acquired that property?

Mr. Victor Cogen: Is that the date on the deed from Rena Polakof to Mr. Polakof? [198]

Mr. Hindin: Well, we will get into that.

A. I don't recall it.

(Testimony of Ivan Polakof.)

Q. Pardon? A. I don't recall it.

Q. Did you record the deed to that property, do you know?

The Court: The record is the best evidence, counsel.

A. I have no knowledge going back that far.

Q. By Mr. Hindin: Anyway, since the time that you got the deed from Rena Polakof you were the owner of that property. Did anybody else deal with that property for you? A. Yes.

Q. Who did? A. My father.

Q. Your father dealt with these lots for you?

A. Yes.

Q. And there were numerous transactions, were there not, with reference to this property before this Rivkin sale? A. Numerous transactions?

Q. Yes.

A. I believe there was one, a lease.

Q. There was a trust deed, was there not, on this property then?

A. Yes; I believe so. I had to put a trust deed to get a loan on it.

Q. And that first trust deed was away back in 1933, [199] was it not?

A. The first one? Yes; I believe so.

Mr. Victor Cogen: If your Honor please, I am going to object to this. It is wholly immaterial to this case.

The Court: It seems to me the record is the best evidence. To ask a man about a transaction when

(Testimony of Ivan Polakof.)

there is better evidence available, I think is unfair.

Q. By Mr. Hindin: Do you remember what the amount of this previous trust deed on this lot 7 and 8 was; the amount of it?

Mr. Victor Cogen: If your Honor please, I make the objection that the record is the best evidence.

The Court: I am going to sustain the objection.

Q. By Mr. Hindin: Do you recall, Mr. Polakof, having a transaction with a man by the name of R. R. Sweeney? A. Yes, sir.

Q. Do you recall that you were engaged in a lawsuit with Mr. Sweeney? A. I do.

Q. Do you recall that on February 13, 1935, Mr. Sweeney secured a judgment against you?

A. He didn't secure judgment against me. He secured a judgment against Cognac Winery.

Q. Were you not named as an individual defendant in that case?

A. I was; and then the Judge of the court ruled it out. [200]

Q. What interest did you have in that Cognac Winery?

A. I owned 50 per cent of the stock.

Q. Now, do you have any information or knowledge concerning an abstract of judgment that was filed, in which you were named as the judgment creditor by Mr. Sweeney?

A. I don't understand the terms. I don't know.

Q. In 1935?

(Testimony of Ivan Polakof.)

A. The terms you are speaking of, I am not acquainted with them.

Q. Do you know whether this judgment was ever satisfied on the——

Mr. Victor Cogen: Just a minute. Your Honor, I think if there is a judgment——

The Court: I think the judgment is the best evidence.

Mr. Hindin: Very well. We will produce that judgment, then.

The Court: All you are doing is proving that this man had a reason for not putting the property in his own name. That is all you are doing.

Mr. Hindin: This is an equitable proceeding, your Honor.

The Court: I know, but that is all right.

Q. By Mr. Hindin: With reference to **this** Baldwin Park property, did you go back to school after it was purchased?

A. I spent some time in school after the purchase of it. [201]

Q. Where did you go to school?

A. I went to the Kirksville College of Osteopathy and Surgery, Kirksville, Missouri.

Q. During that time your father handled this property?

A. There wasn't much to handle. He would look out for it for me, sure.

Q. When did you return from school?

(Testimony of Ivan Polakof.)

A. I returned several times from school. I was called back home.

Q. When was the first time you were called back home?

A. At the time of this first bankruptcy hearing.

Q. Well, you were back home in January of 1939, were you not?

A. Yes. I was attending school here.

Q. You were attending school here?

A. In Los Angeles.

Q. At that time? A. Yes, sir.

Q. Were you in business at that time?

A. I was helping out at the Ace.

Q. You were helping at the Ace Distributing Company? A. Right.

Q. Who was working at the Ace then?

A. Do you want the individuals?

Q. Yes.

A. Marvin Polakof was the owner. My father worked [202] there. We had several employees.

Q. Who were they?

A. I, and Mr. Kahn was there.

Q. How long did you work there?

A. It was always off and on; never anything definite.

Q. You lived at home, did you? A. I did.

Q. Did you ever discuss with Marvin and with your father the affairs of this business?

A. Just the welfare of it.

Q. Yes. Did you have any information of with-

(Testimony of Ivan Polakof.)

drawals of money from that business from January, 1939, to April, 1939? A. No.

Q. You didn't know money was being withdrawn?

A. I don't know of any specific money that was being withdrawn, no.

Q. You don't? A. No.

Q. Did you withdraw any money from that business?

A. From time to time they would make me little personal loans to help out, which I repaid.

Q. When did you repay it?

A. The books will have to show that. I couldn't give the dates.

Q. As of April 24, 1939, did you owe the business any [203] money?

A. I might have owed them some money. I don't know the exact amount.

Mr. Joseph Cogen: Aren't the books the best evidence, counsel?

Mr. Hindin: This is cross examination.

Mr. Joseph Cogen: All right.

Mr. Victor Cogen: If your Honor please, Mr. Polakof is suffering with a heart trouble. He just made a motion to his heart, and I am just wondering if the court wants to excuse him for a few minutes. Do you want to be excused?

The Witness: I have documentary evidence to that effect.

Mr. Victor Cogen: No. That is all right.

(Testimony of Ivan Polakof.)

The Court: We will take a five-minute recess at this time.

(Recess.)

Q. By Mr. Hindin: Mr. Polakof, were you in Los Angeles between January 1, 1939, and April, 1939? A. I don't know. When; 1939?

Q. Yes.

A. Will you state the date once more, please?

Q. From January 1st to the end of April.

A. In 1939?

Q. Yes. A. Yes; I was in Los Angeles.

Q. During that time you were living at home?

[204]

A. Right.

Q. Did you ever see a financial statement of the Ace Distributing Company at your home——

A. No, sir.

Q. During that time? A. No.

Q. Did you know the condition of the business at that time?

A. As far as the books go, no. All I knew is that they were paying their bills and going right along.

Q. Did you discuss with your father and Marvin the advisability of recording this Baldwin Park property deed at that particular time?

A. No, sir.

Q. At any time? A. Never.

Q. Did you ever write your father a letter respecting this property? A. Never.

Q. You never did? A. Never.

(Testimony of Ivan Polakof.)

Q. In other words, your father, to your knowledge, did not know that this deed to you was being recorded at that time?

A. The one I sent to Marvin at Omaha?

Q. Yes. [205]

A. Surely; I told my father what I was doing.

Q. You told him you were going to record it?

A. That is right.

Q. Did you ever authorize your father to specify or indicate that he was the owner of this property?

A. At no time, no.

Q. Pardon? A. I never did.

Q. You say you started the Ace Distributing Company; is that correct? A. That is right.

Q. And when did you start it?

A. I can't tell the date. I left the Monte Christo Vintage Company one month after that. That was in 1935 some time, I believe.

Q. Some time in 1935?

A. I would have to refer to the records.

Q. Pardon.

A. I would have to refer to the license to give you the exact date.

Q. How long did you own the Ace Distributing Company's business?

A. Up until the time I gave it to Marvin.

Q. When did you give it to Marvin?

A. On the date of the new application for license.

Q. What date was that? [206]

(Testimony of Ivan Polakof.)

A. I don't recall. I would have to check with the license.

Q. Approximately what year, as nearly as you can ascertain or remember?

A. I wouldn't want to make a statement. Dates don't agree with me and I—it is a matter of record. You have it on the license, so I——

Q. Well, can you fix the time by anything other than——

A. No—oh, yes, I can fix that. At the time of transfer to Marvin I went to work for the Southern California Winery.

Q. That was the time you gave Marvin your business?

A. That is right.

Q. Did Marvin pay anything for that business?

A. No, sir.

Q. You just gave it to him?

A. It was an out and out gift.

Q. It was an out and out gift?

A. Just to give him a start.

Q. How much money did you have invested in the business?

A. The fixtures and equipment, about \$700 for equipment. The good will was worth something—the good will and customers I developed.

Q. Did you give him title to that business, or did you just have an understanding?

A. No; it was handled by a counsellor. There was a [207] license.

(Testimony of Ivan Polakof.)

Q. Aside from this license procedure what did you do with reference to turning over the assets?

A. I don't know.

Q. You didn't do anything, did you?

A. I made it known to everyone that I was in the Southern California Winery. I established myself there. They knew that, according to law, I couldn't be there and have any interest in any distributing company. They knew if they did business with Marvin they were doing it solely on their own, and not with me.

Q. Was this before or after the Baldwin Park property was acquired?

A. Before I transferred—before the property went to Marvin?

Q. Yes. When you gave this business to Marvin was that before or after you acquired the Baldwin Park property?

A. Once again I would have to refer to the date.

Q. Do you have any recollection of that?

A. No, sir. It didn't impress me as being important.

Q. You knew, then, that Marvin was in business for himself, didn't you?

A. Yes; I knew that.

Q. And you knew that title to this Baldwin Park property was in his name, didn't you?

A. Yes. It is a matter of record. Sure. [208]

Q. And notwithstanding that you knew he was

(Testimony of Ivan Polakof.)

in business and that the property was in his name you did nothing about it?

A. I impressed upon him that he should never hold himself out that he was the owner of that property. And he never entered it on any financial statement, even when it was in his name. Everyone that knew me will say that it was my property. In fact, they didn't know Marvin.

Q. But why did you warn Marvin not to hold it out to his creditors?

A. I didn't want him to represent to the creditors that he had that property.

Q. But you knew he had creditors in the business, didn't you?

A. But he wasn't getting credit on that particular piece of property.

Q. Notwithstanding the fact that you knew all that, you continued to leave it in his name. Did you ever, up to April, 1939, ask Marvin how much he owed in his business? A. No.

Q. You did know, did you not, that with Marvin having title to this property in his name, creditors or people doing business with him could suspect him of owning it, did you not?

Mr. Joseph Cogen: Just a minute—[209]

The Court: That is going a little bit too far, counsel. Objection sustained.

Q. By Mr. Hindin: How old were you—well, I will ask you this: How old are you now?

(Testimony of Ivan Polakof.)

A. 31. You did not catch me like you did my brother.

Q. Did you ever pay your father back that \$300?

The Court: That is immaterial, counsel.

Mr. Hindin: That is all.

Mr. Joseph Cogen: That is all.

Mr. Victor Cogen: I wonder if Mr. Ivan Polakof can be excused from attendance here? We will have him either at the hotel or at my office in the event counsel wants him.

The Court: All right. [210]

MAURICE KAHN,

recalled as a witness on behalf of defendants, testified as follows:

Direct Examination

Q. By Mr. Joseph Cogen: Did you make a statement, from the records and books of the company, as of August 30, 1937?

A. Yes. I inspected the ledger and made up a trial balance.

Q. What does it show the total amount of gross assets?

A. August 30, 1937, the records I found show—taking the inventory as of the first of the year—show the net worth of \$2,424.06.

Mr. Hindin: How much was that?

(Testimony of Maurice Kahn.)

A. \$2,424.06.

Mr. Joseph Cogen: I don't think he answered my question, but I will leave it stand.

The Court: That is what you are driving at, anyhow.

Mr. Joseph Cogen: Yes. He has answered it, yes.

Q. Did you also take a statement on September 30, 1937? A. Yes.

Q. What does the net worth show at that time?

A. \$2,583.56.

Q. Did you ever have any conversations with—

Mr. Victor Cogen: Do you mind if I handle the rest of the examination? [211]

The Court: Go ahead.

Q. By Mr. Victor Cogen: Do the books indicate that the property known as the Baldwin Park property was listed as an asset of the business?

A. It was never listed on the books. It was never carried on the books.

Q. In other words, as far as the books of the Ace—

The Court: That has been asked and answered, counsel.

Mr. Victor Cogen: All right.

Q. I am going to ask you in reference to this matter of the Acampo Winery. Just to refresh your recollection, all of the invoices of the Acampo Winery were paid by trade acceptances—

A. That is right.

Q. —except this one matter which I am going

(Testimony of Maurice Kahn.)

into at this time. Was that the course of business for about four or five years before and after, from about 1935 to 1940?

A. Well, I would have to refresh my memory from the records to a great extent, but as I remember, at one time one of the representatives of the Acampo Winery came down and checked over the money—the balance due—and we found out that there were trade acceptances—that is, the Acampo Winery had trade acceptances for everything except the certain items in dispute, which consisted of bottled goods.

Q. In other words, everything was covered by trade [212] acceptances, in the ordinary course of business, except the bottled goods?

A. That is right.

Q. And this bottled goods was Acampo Winery's, under their own label? A. Yes.

Q. Which they wanted to have a distributing office in Southern California?

Mr. Hindin: Just a second. If the court please, I am going to interpose an objection to this line of examination on the ground that it attempts to go behind a proven claim in the bankruptcy court of Acampo Winery and is, therefore, incompetent and immaterial with reference to this action.

Mr. Victor Cogen: We are not questioning the account, counsel. We are questioning that there was no debt at the time of the transfer of the property and no debt was in existence until the trade ac-

(Testimony of Maurice Kahn.)

ceptance was given, because if at that time they were merely acting as agents for the Acampo Winery it shouldn't be on the books of the company, nor should it be considered a debt of the company.

Mr. Hindin: That goes behind the bankruptcy claim that has been proved.

The Court: On the other hand, if one of the parties to this action is not a party to that bankruptcy proceeding he is not bound by it. [213]

Mr. Victor Cogen: That is right.

Mr. Hindin: Pardon me?

The Court: Isn't it true that Ivan was not a party to the bankruptcy proceedings and is not bound by it? So you have to prove your case, as far as he is concerned, and that is the reason you introduced the claim.

Mr. Hindin: That is right.

The Court: I think I will overrule the objection.

Mr. Victor Cogen: Will the reporter repeat the question?

The Court: Let's get down to business and find out what the transaction was on this bottled wine, instead of asking a lot of questions.

Q. By Mr. Victor Cogen: All right, Mr. Kahn, let's make it short. Tell the court exactly what was done in reference to the bottled wine transaction, how it was handled through the salesmen of the Acampo Winery, and how it was handled as far as the Acampo Winery is concerned, and when settlement was made, and what was finally done with

(Testimony of Maurice Kahn.)

reference to the payment of money and trade acceptances.

A. Well, I can start off the whole thing by saying it was just one of those things—in other words, a lot of bottled wine was shipped down by the Acampo Winery, and an invoice later came in from the Acampo Winery and I asked what was the reason for the invoice. And, as I understood it, under the State law no licensee is allowed to ship wine [214] to another licensee on consignment basis; but the understanding was that it really was a consignment basis.

Q. From whom to whom?

A. From Acampo Winery to the Ace Distributing Company; but at the same time the Acampo Winery set up—was supposed to have set up a sales division here, and they paid two salesmen, Menilla and Russo, and I believe Mr. Lenci was supposed to be head of it, or something like that. I do know this: That at that time they were not paid by the Ace Distributing Company. If they were, the books will reflect it. In other words, I am not relying entirely on my memory. They went out and received orders; they passed on the credit——

Q. Who passed on the credit?

A. These salesmen. They took the samples supposed to be charged to either them or Acampo Winery; and I believe at the time—I don't remember—but I believe all the records were kept in an envelope, or something, so that when a settlement was made they would straighten it out.

(Testimony of Maurice Kahn.)

Mr. Hindin: I am going to move, if the court please, to strike all of that portion of the witness' answer which refers to what the Acampo Winery did, on the ground that there is no proper foundation laid that any representative or agent of the Acampo Winery is here, and this man is not qualified to lay a foundation as to the agency of any agent or representative of the Acampo Winery.

The Court: Well, he can testify as to what happened [215] down there.

Q. By Mr. Victor Cogen: Were some of the bills marked "Acampo Winery"?

The Court: Did the Ace people sell that wine themselves?

A. Bill it out themselves?

The Court: Yes.

A. Yes.

The Court: Did the Acampo Winery people bill it out, too?

A. No, sir. They didn't have any——

The Court: When these salesmen went out and sold this wine who would deliver it?

A. Ace would deliver it.

The Court: Who would collect for it?

A. Sometimes the Ace would; sometimes the salesmen.

The Court: Did the money come in to the Ace from whoever collected it?

A. Not all of it. There was a dispute on that, too.

The Court: At the end of the time did they have a settlement?

(Testimony of Maurice Kahn.)

A. Yes.

The Court: How long after the wine was received?

Q. By Mr. Victor Cogen: Was that some time in January?

The Court: Just a moment. Let the witness answer.

A. I believe it was settled when trade acceptances [216] were made for the bottled wine.

The Court: How much was the original invoice?

A. I would have to check the records. There were two or three invoices, and there was some wine came over from another place, in which no invoice was ever received by the Ace Distributing Company. In other words, if I remember, they sent out a statement as to what the bottled wine account was, and I could only trace two or three invoices against their bills; and they had about four invoices, and we later found out that some wine had come from a distributor to whom they had sent the wine, and then it had been sent to Ace Distributing Company. And someone in Pasadena had received some bottled wine and they sent it over to the Ace Distributing Company. And there were one or two involved transactions. Wine would come in without any invoice. In other words, it was supposed to be billed by the winery.

The Court: As I understand, it was originally billed to them, but it was a secret understanding?

(Testimony of Maurice Kahn.)

A. There must have been something.

The Court: You don't know, do you?

A. No.

The Court: That is all, then.

Mr. Victor Cogen: You see, your Honor, the man that handled that is the man that is now deceased.

The Court: That is one of the unfortunate things: [217] when somebody dies they take something with them.

Mr. Victor Cogen: But I can ask questions, your Honor——

Mr. Hindin: Just one second. Before you ask the next question I would like to interpose an objection and move to strike all the testimony of this witness concerning this deal with Acampo Winery, on the ground that it is circumstantial evidence.

The Court: We haven't a jury here.

Mr. Hindin: We have a record, though, your Honor.

The Court: All right. I am going to deny the motion for your record.

Q. By Mr. Victor Cogen: Was this entire matter settled up some time when a payment of \$600 was made and trade acceptances for \$811 issued for the first time in reference to these items, and the trade acceptances being due some time around May 20, 1940? A. I believe that was the transaction.

Q. They have a trade acceptance set forth in their——

(Testimony of Maurice Kahn.)

The Court: Counsel, I have heard enough about this bottled wine. We have spent so much time on it already.

The Witness: If the court please, there is only one thing I can say about it: That before this thing was settled I was present with Mr. Mondavy and, I believe, Mr. Polakof was there, and they had me go over the records, and whatever conversation took place—I mean we all chipped in our bits of information to settle the whole thing. [218]

The Court: Well, you had a dispute and you settled on a certain amount?

A. That is right. In other words, Mr. Mondavy, who was either vice-president or president of the winery, came down to straighten out the matter; and he admitted certain facts and certain things were allowed against the winery, and certain things against Acampo were disallowed. That is the way we settled it. We took no cognizance of the invoices we had in our possession, at all; just took the Acampo Winery figures.

The Court: All right.

Mr. Hindin: I have no further questions.

Mr. Victor Cogen: That is all. Defendants rest.

Mr. Hindin: No rebuttal. I would like about 20 to 30 minutes, if the court would grant me that.

The Court: Yes. I would just as leave get it over

with right now, then we won't spoil the afternoon for anybody.

Mr. Hindin: There is, under the law of the State of California, two pertinent code sections in the Civil Code of the State of California. The first one is 3439, which in 1939 was amended by substitution of the uniform fraudulent conveyance act. But for purposes of this hearing I assume that the acts in question took place before the effective date of the amendment. So that the effective section, as of the dates in question, is the old 3439, and [219] the old section 3442 of the Civil Code. Section 3439 is very short, and with your Honor's permission I would like to read it.

“Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.”

That is the first section. The second section which is involved in this action is 3442, which is equally very short and I would like to read it.

“In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not law; nor can any trans-

fer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

Now, if the court please, there is a distinction between those two sections. The first section provides for the [220] voiding of transfers made with intent to defraud or delay creditors. And the cases which I have cited, and which I will call to your Honor's attention in construing that section, hold that the intent must be proven. The intent to defraud must be proven. How that is proven is from circumstantial evidence, as the cases hold. In this case if the transfer is fraudulent because of the intent to defraud, it is void as against creditors and the question of insolvency is immaterial. I have considerable authority on that point and I will submit it to your Honor. We find from the first section, which is that if there is a fraudulent intent, as shown by circumstantial evidence, the question of solvency is immaterial and the transaction is void by reason of the intent. And the second section is what we might call a statutory fraudulent transfer, in that where a transfer is made by a debtor who is insolvent at the time, or is made in contemplation of insolvency and the transfer is without adequate consideration,

then it is fraudulent and void as to existing creditors without any other proof of the fraudulent intent.

Now, there is still another doctrine in the law which, I take it, is important for the consideration of the court, and that is this: That where there is a showing that a transfer is made without adequate consideration, and a showing is made that there are unpaid existing creditors, by just those two facts a *prima facie* case of fraud is made [221] out and the burden shifts to the defendant, to the transferee, to show solvency on the part of the grantor. There is a federal case, a Circuit Court of Appeals case, so holding that doctrine. There are numerous California cases, which I will cite to the court. Now, we find that there are these two doctrines of fraud, if you please, requiring different amounts of proof. Let us take the facts in this case, with reference to the first, and that is the question of actual fraudulent intent. In this case the facts show, I believe——

The Court: I have heard the facts and I am still looking for any evidence of intent to defraud. I think I should tell you in that regard, in fairness to your argument, that the reason I am calling upon you is that I can't see where the usual badges of fraud appear in this picture.

Mr. Hindin: Very well. May I answer that, your Honor?

The Court: Yes.

Mr. Hindin: That will, then, eliminate the first type of fraud for the purposes of argument. The second type of fraud is statutory, and that holds, under Section 3442 of the Civil Code, that a transfer made by a person without adequate consideration, and in the face of insolvency and in the face of existing creditors, or made in contemplation of insolvency, is fraudulent without the necessity of proving any further intent whatsoever. I have here some six or eight cases, some by the Circuit Court of Appeals [222] of the Federal Circuit, others by the Supreme Court of the State of California, and other courts of last resort, holding that where a transfer is made in the face of existing creditors **unpaid**—just that much—fraud is presumed; the intent is presumed, and the burden of proving solvency and good faith is upon the defendant, the transferee, if you please, as well as the grantor.

If that is the State law we have only to look, then, to see whether or not we have made out a case of *prima facie* fraudulent intent; and that is a lack of consideration for the transfer in the face of existing creditors. Now, I believe there is no argument that there were existing creditors. That is a clear fact. The second point is, was it made while the defendant was insolvent or was it made in contemplation of insolvency. We find in the record this evidence: That the defendant, Marvin Polakof, ostensibly ran this business. We find that from the first of January of 1939 until the effective date of the transfer all the capital had been withdrawn

from the business, from a \$2,000 net worth to approximately no net worth—or, \$37, I believe, taking the accountant's figures—without recognizing these additional claims. We find this situation: The net worth being withdrawn from the business, and at the same time this transfer being made without consideration. And then within six months after that we find that there was an insolvency to the extent of \$2,000. [223]

Now, under the cases which I will cite to your Honor, and which I will sincerely ask your Honor to read, that is fraud by reason of the operation of these code sections. And in the face of that the burden then shifts to show solvency on the defendant, which, I submit, has never been shown in this case. And under those circumstances, your Honor—I don't want to keep you over your lunch hour.

The Court: Don't worry about that. If you have anything you want to say I will be glad to hear from you.

Mr. Hindin: I have prepared here, your Honor, a very brief memorandum of the points and authorities, which I will be glad to submit to your Honor for your consideration. It will save my time and save the court's time in analyzing each one of these cases. And I sincerely urge upon the court to read those cases, because they clearly set out the right of the creditors, in this case the trustee in bankruptcy, to rely on this *prima facie* showing. Once that *prima facie* showing is made the cases are

legion that it devolves upon the defendant under this cloud to show how it was, and that, in my opinion, was not proven. They did not carry that proof forward. I would ask leave of the court at this time to file this memorandum of points and authorities. [224]

The Court: I think there is plenty of law on your side, but I think the facts are very weak. The facts preponderantly show that this property belonged to Ivan from the inception of the transaction. There is no dispute about the fact that Ivan paid off this other co-owner, by a cashier's check, I believe, of something over a thousand dollars. That is one of the strongest evidences of interest in property, to pay off the encumbrance that effects it. I further feel that there is no evidence here that these people did what is ordinarily done when there is a piece of property in one's name, that is, to hold it out to his creditors.

Mr. Hindin: May I show your Honor where that was actually done? There are two statements, your Honor, which I don't believe you had an opportunity to inspect. They were rushed over quite rapidly. These two statements mention real estate, and there was no other real estate involved.

The Court: I understand this was explained as real estate worth \$15,000, and the encumbrance \$10,500.

Mr. Hindin: It shows \$20,500, which is approximately what they valued the property. And the only thing they offered to prove what that meant was

that they had an option to purchase the property. An option, we know, is not an interest in real estate.

The Court: But, on the other hand, if they treated [225] as an obligation the liability under the option, then they would also, at the same time, have treated the property covered by it as an asset.

Mr. Hindin: Well, actually, the option, I don't believe, was ever exercised, your Honor. And before exercising it they couldn't assume it as an obligation.

The Court: I think that the defendants' explanation of that is satisfactory to the court, at least.

The burden in the case of fraud is always on the plaintiff. This encumbrance took place in 1937. The evidence is that they were solvent at that time. The fact that they took the transfer in 1939 is a question of whether they were solvent or insolvent. The accountant figured out they were solvent by about \$37, but he stated that figure might vary as much as \$500 one way or the other. It was an estimate. But the original transaction took place years before, and the recording of it. There was no pressing of creditors at the time this deed was recorded, and the bankruptcy did not take place until 18 months after.

I feel that the court should not break in and take property away from a defendant and turn it over to a trustee unless the evidence is strong

and convincing. A judgment in this case in favor of the trustee would be to take property away from an individual. I think that the record of title in his name should not be overcome, except by very strong and convincing evidence. To hold otherwise [226] would be to do a grave injustice to the parties, and I don't believe that our courts should lend themselves to leaning backwards to enable trustees to take property which they claim in their enthusiasm. And if I were to hold in favor of the plaintiff in this case I would do exactly that, because it hasn't any of the badges of fraud. There is no evidence that any creditor has been misled in any way, shape or form by the fact that this title was in the name of Marvin. The fact is that the evidence has not disclosed that any of them knew of it.

As far as Marvin Polakof is concerned, the court has not any particular sympathy for him. I think the testimony of a young able-bodied man, who comes into court and has to admit that he has not paid for the wedding ring that he bought on a conditional sales contract, and a suit of clothes that he wore out, is not worth a great deal. And I have not given a great deal of weight to his testimony for that reason. I think he ought to be ashamed of himself, and if he had any manhood he would at least pay for those personal obligations. They are moral obligations, as far as that is concerned. But at the same time, this court has to

find from the evidence. The law is clear, to my mind, but the evidence in this case is lacking.

Judgment will go for the defendants. Defendants' counsel are directed to prepare and submit the findings within ten days. [227]

Mr. Victor Cogen: Will you waive findings?

Mr. Hindin: No; we want findings. May we have an order, your Honor, that this judgment is without prejudice to the rights of the trustee to ask for letters of administration to the estate of Sam Polakof?

The Court: This hasn't anything to do with Sam Polakof. He is not a party to it.

Mr. Ehrlich: What Mr. Hindin meant, your Honor, is that it be without prejudice to any claims which we might subsequently prove that Sam Polakof might have in and to this property.

The Court: I don't know. I think that the administration of these estates is the responsibility of the referee, and the referee should not authorize a piecemeal suit. There should not be another suit brought now. If it was going to be brought it ought to have been brought against both parties originally. I think it is unduly delaying the administration of the bankruptcy proceedings. If there is any such claim against Sam Polakof that is a matter for the referee to pass on. If he wants to authorize a suit, of course, that is within his discretion; but if it came before this court for review I think I would find that he had abused his

discretion to permit a piecemeal litigation. I don't think it is fair. I think there should be an end to litigation; that it should not be carried on piecemeal.

Mr. Ehrlich: Thank you, your Honor.

[Endorsed]: Filed Feb. 27, 1942. [228]

[Endorsed]: No. 10117. United States Circuit Court of Appeals for the Ninth Circuit. Gustave I. Goldstein, as Trustee in Bankruptcy of the Estate of Marvin Polakof, Appellant, vs. Marvin Polakof and Ivan Polakof, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 27, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

#10117

GUSTAVE L. GOLDSTEIN, etc.

Appellant,

vs.

MARVIN POLAKOF, et al.,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL and DESIGNATION
OF PARTS OF THE RECORD TO BE
PRINTED.

The Appellant intends to rely upon the following points on this Appeal:

1) The trial court erroneously found and held that the defendant, Ivan Polakof, owned the property involved in this action from the inception, and that the defendant, Marvin Polakof, never had owned any interest in the said property, which finding is contrary to and not supported by the evidence.

2) The trial court erroneously found that the evidence did not show fraud in the transfer of the said property by the defendant, Marvin Polakof, to the defendant, Ivan Polakof.

The Appellant hereby designates the following parts of the record to be printed:

Complaint

Answer of Marvin Polakof

Amended Answer of Ivan Polakof

Stipulation for Amendment of Complaint dated
October 2, 1941

Findings of Fact and Conclusions of Law
Judgment

Notice of Appeal

Reporter's Transcript of Testimony (beginning
at page 2 and continuing until the end at
page 228)

All of the exhibits, with the exception of Plaintiff's exhibits 1, 2, and 6, and the four claims in bankruptcy which were admitted by reference, and defendant's exhibit A, all of which are to be omitted from the printed record. Instead of these omitted exhibits, the printed record is to contain the following statement:

"Plaintiff's exhibit 1 is a Deed from R. E. Allen, as Trustee in Bankruptcy of Realty Mortgage Corporation to A. Fratkin and Marvin Polakof, dated October 30, 1935, covering the property involved in this action. The deed recites a consideration of \$2,625.00 and was recorded in the office of the Recorder of Los Angeles County on January 4, 1936.

Plaintiff's exhibit 2 is a deed from A. Fratkin and Marvin Polakof, to Marvin Polakof, dated May 15, 1936, covering the same property. The deed recites a consideration

of \$10.00, and was recorded on May 18, 1936.

Defendant's exhibit A is a Stock Certificate #42 for five shares of Commemara Mutual Water Co., issued to Ivan Polakof dated October 11, 1937''.

Dated at Los Angeles, California April 23, 1942.

JEROME L. EHRLICH and

MAURICE J. HINDIN,

By MAX BERGMAN,

Attorneys for Appellant.



No. 10117

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the
Estate of Marvin Polakof,

Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,

Appellees.

APPELLANT'S BRIEF.

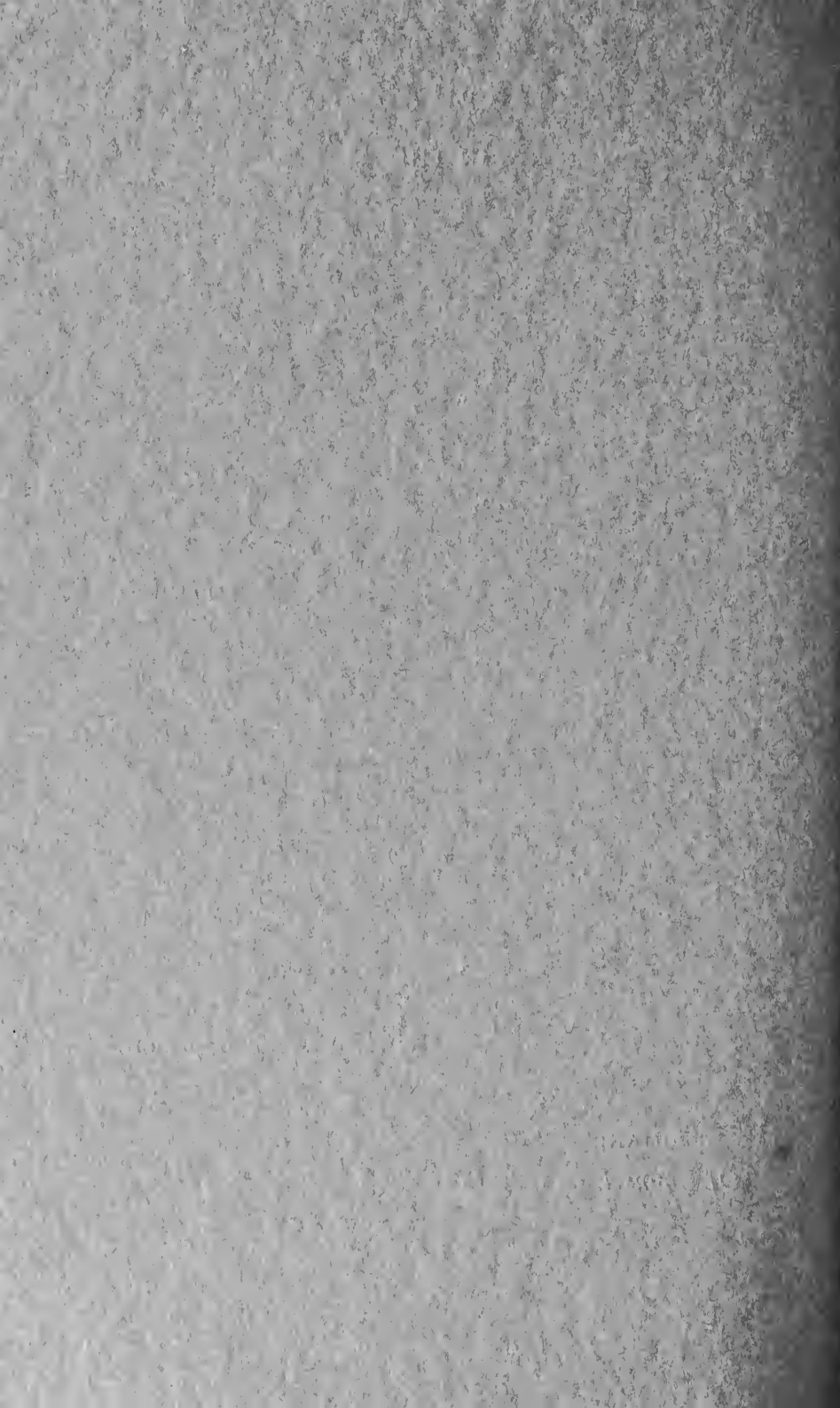
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MAX BERGMAN,
Of Counsel.

FILED

OCT 28 1942



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No. 10117

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the
Estate of Marvin Polakof,

Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,

Appellees.

APPELLANT'S BRIEF.

Jurisdiction.

This appeal is by the plaintiff from a judgment for the defendants in an action brought in the District Court for the Southern District of California by the plaintiff as a trustee in bankruptcy against the bankrupt, the defendant Marvin Polakof, and his brother, the defendant Ivan Polakof. The object of the action is to quiet title to a parcel of improved real property located in Los Angeles County, California, and to set aside a fraudulent transfer of the property by Marvin Polakof to Ivan Polakof. [Complaint, R. 2-7.]

The jurisdiction of the District Court was based upon Sections 23c and 70e, Bankruptcy Act (11 U. S. C. A. 46c and 110e).

The action was tried before Judge Ben Harrison without a jury and resulted in a decision for the defendants. [R. 18-25.] Judgment was entered for the defendants on October 31, 1941. [R. 25-27.]

Within the statutory time the plaintiff filed his notice of appeal to this court. [R. 28.]

The jurisdiction of this court is invoked under Section 128, Judiciary Code (28 U. S. C. A. 225).

Statement of the Case.

Two main issues were formulated by the pleadings and tried before the trial court: (1) Did Marvin Polakof, the bankrupt, own the property for a period of several years prior to the bankruptcy? (2) Was the transfer of the property by Marvin Polakof to Ivan Polakof fraudulent?

The trial court found for the defendants on both issues, *i. e.*, that Ivan Polakof was the owner of the property during the entire period and that Marvin Polakof never had any interest in it [Finding V, R. 21], and that there was no fraud in the record transfer of the property by Marvin Polakof to Ivan Polakof. [Findings VIII and IX, R. 22.]

This appeal is predicated mainly upon the contention that these findings are against the weight of the substantial evidence. We therefore deem it important to present at the outset a resumé of the evidence bearing upon the two issues, but before proceeding with the discussion of the evidence about the property itself it is necessary to consider the background of this litigation.

Marvin Polakof and Ivan Polakof are brothers and the sons of Sam Polakof, with whom they maintained their home until his death in 1940. There was a close family and business relationship between the father and sons during the period herein involved. [R. 123, 210.]

The wine distributing business, which was nominally owned by Marvin Polakof under the name of Ace Distributing Company when it was adjudged a bankrupt on December 5, 1940, was originally organized by Ivan Polakof in 1934. The business remained at the same address—786 Kohler Street, Los Angeles,—from its inception in 1934 until its demise in 1940. Sometime around 1935 Ivan Polakof made a gift of the entire business, including equipment, merchandise and goodwill, to Marvin Polakof. Thereafter Marvin Polakof was formally the owner of the business, but Ivan Polakof continued to work for the business intermittently and to take an active interest in its welfare. Even as late as January, 1939, Ivan Polakof was working for the business, while at the same time he was attending school. [R. 142, 160, 231-232, 237-238, 247, 250.]

Although the formal ownership of the business was changed from one brother to the other, neither was actually in charge of the business operations while their father was alive. It was the father, Sam Polakof, who ran the business for the family from the outset and devoted all his time to it, while both Marvin and Ivan were studying for professions and spending considerable periods of time away from Los Angeles. [R. 142-144.]

In July, 1936, Marvin Polakof executed a power of attorney in favor of Sam Polakof, which was recorded in the Los Angeles County Recorder's office. Under this

power of attorney Sam Polakof was given the most sweeping powers to act on behalf of Marvin Polakof in any matter whatsoever, in the same manner as if Marvin Polakof had acted personally. [Exh. 4, R. 103-105.]

Among the activities of the business handled by Sam Polakof was the arrangement of credits. [R. 144.] On March 1, 1940, or within less than a year prior to the bankruptcy, Sam Polakof issued a financial statement [Exh. 7, R. 147-150] for

“Sam Polakof and Sons,
Customer at office
Address—786 Kohler Street,
Los Angeles, Calif.
Business—Wholesale liquor dealer.”

It was conceded (1) that the only business with which Sam Polakof was connected in 1940, was the one which became bankrupt several months later; (2) that the bankrupt was the only wholesale liquor business at 786 Kohler Street, Los Angeles, in March, 1940; (3) that there was no other business then located at 786 Kohler Street, Los Angeles. [R. 142-145.]

The only conclusion that can be drawn is that this statement on behalf of Sam Polakof and Sons was made on behalf of the business which subsequently became bankrupt, because there was no other business to which it could have referred.

This statement which, as will be shown, lists the property herein involved as an asset of the business [R. 150], speaks louder than words. It confirms what appears obvious throughout the evidence, *i. e.* (1) that there was no line of demarcation where the interests of the father

or one of the brothers began and the interests of the others ended; (2) that the formal ownership of the business in one or the other of the brothers was of no consequence; and (3) that the business was owned and operated by Sam Polakof and the two sons as a family matter.

Incidentally, it is to be noted that this statement of March 1, 1940 listed assets of \$39,594.67 [R. 148] and liabilities of \$9,970.68 and a net worth of \$27,623.99. [R. 149.] On October 24, 1940, after the death of Sam Polakof, another statement was issued for the business over the signature of Marvin Polakof, which showed assets of \$45,341.85, liabilities of \$19,697.34 and a net worth of over \$25,000.00. [Exh. 9, R. 155.]

Nevertheless, only 6 weeks later—December 5, 1940—the business was adjudicated a bankrupt with the liabilities far out-weighting the assets. The discrepancy, between the handsome net values reflected in the statements and the bankrupt condition actually existing a short while later, is so glaring as to need little comment.

Another significant item of evidence is the testimony of Maurice Kahn, an accountant, who was in charge of the books of Ace Distributing Company and who prepared a statement of the financial status of the business for the year 1939. [R. 178-195.]

In explaining the financial set up as of April 30, 1939, Kahn testified [R. 188]:

“In going over the records as of April 30th, Marvin Polakof himself is charged with \$26.15. Then there is set up, as assets here, Sam Polakof \$1300, and Ivan \$300.”

If the business belonged solely to Marvin Polakof why did its books show charges and credit against all three Polakofs?

We only cited a little of the evidence relating to the three Polakofs, but a reading of the entire record will prove even more overwhelmingly, if not conclusively, that the bankrupt business was an instrumentality of both father and sons and not the exclusive domain of Marvin Polakof.

We now come to the property involved in this action.

The property consists of a lot improved with an industrial building in the eastern part of Los Angeles County. There was a considerable divergence in the testimony as to the value of the property. Marvin Polakof attempted to belittle its value and testified that it was worth only between \$1500.00 and \$2500.00, while appraisers testified that the value was between \$8500.00 and \$9500.00. [R. 37-38, 70, 80.] But here again the documentary evidence is overwhelming in favor of the higher valuation, because 1. in the financial statement which was issued on March 1, 1940, Sam Polakof who managed and ran this property stated that its value was \$12,000.00 [R. 150]; and 2. the property was assessed for Los Angeles County tax purposes at \$4,000.00 [R. 114] indicating an actual value of at least \$9,000.00 due to the prevailing system, in which we respectfully ask the court to take judicial notice, to assess property at not more than half of the real value.

The property was originally purchased in 1935 by Marvin Polakof and one A. Fradkin at a bankruptcy sale for \$1,625.00. The deed dated December 30, 1935,

was recorded a few days later. [Exh. 1, R. 31.] A few months later A. Fratkin conveyed his interest to Marvin Polakof who then became sole owner. This deed, dated May 15, 1936, was also recorded three days later. [Exh. 2, R. 32.]

The record title remained in Marvin Polakof until April 24, 1939, when there was recorded a deed from Marvin Polakof to Ivan Polakof which was dated August 26, 1937, or more than a year and a half earlier. [Exh. 3, R. 32-34.]

Both Marvin Polakof and Ivan Polakof testified that Ivan Polakof was actually the original purchaser in 1935 of the property in common with Mr. Fratkin; that Marvin Polakof never had any interest in the property; and that the deed made in 1937 and recorded in 1939 merely restored the property to its rightful owner. Both of them gave as the reason for taking the title in the name of Marvin Polakof in 1935, that Ivan Polakof was then about to take a trip to the east and he did not want to be bothered with the property. [R. 35-36, 227.] The trial court accepted this testimony and found that the property had belonged to Ivan Polakof from the inception. [Finding V, R. 21.] We contend that this testimony is so greatly overwhelmed by the contrary evidence, disinterested and documentary, as to make it insufficient to support the trial court's findings.

Let us first quote the testimony of Ivan Polakof himself. On direct examination by his own attorney he testified [R. 227]:

"Q. By Mr. Joseph Cogen: Do you recall the facts involving the Baldwin Park property, or prop-

erty designated and known as Baldwin Park property, on or about the latter part of the year 1935? A. Yes.

Q. Did you at that time arrange for the purchase of that property? A. I did.

Q. In whose name was that property placed at that time? A. At that time it was placed in Marvin Polakof's name.

Q. Did Marvin Polakof put up any money for the purchase of that property? A. No.

The Court: Why did you put it in Marvin's name? A. My father came to me and told me of the sale of this property in the court. I wasn't very interested, because I expected to go east to school. He convinced me it was a good one, so I raised \$1300 and I said, 'Put it in Marvin's name, because I am going east.' And I expected a quick sale, and I was buying it with Mr. Fratkin for a quick sale. And I said, 'Go ahead and let Marvin sign for it, because I don't want to be bothered with it. I want to go east to school.' *And I went east and I came back, and Mr. Fratkin decided to sell me his interest.* This transaction is how I paid Mr. Fratkin off. But when I decided I was going to own the property myself I sent this deed to Marvin to sign, so I could bring down the ownership."

If the reason for taking the title in Marvin's name was Ivan's proposed trip to the east, then why was title again taken in Marvin's name *after Ivan's return from the east* when Fratkin sold out his half interest. Why did Marvin and not Ivan become the grantee in the deed [Exh. 2] executed by Fratkin and Marvin Polakof in May, 1936?

We will contrast this story with testimony of E. K. Albright, the real estate broker who arranged the original purchase of the property and who during the subsequent years had several dealings with the Polakofs—father and two sons—in connection with the management and leasing of the property. Mr. Albright testified [R. 87-92]:

“Q. Are you acquainted with Mr. Marvin Polakof, who is seated at the counsel table? A. I am.

Q. Did you have occasion to confer or discuss with him about this property between 1937 and 1939? A. I did.

Q. Did you have occasion to discuss this property with him after 1939? A. I did.

Q. Did he ever declare to you that he did not own that property? A. No; he did not declare that.

The Court: I think you had better ask him what he said.

Q. By Mr. Hindin: Let me call your attention to one occasion. Did you have occasion to go with Mr. Polakof to a zoning commission hearing? A. With Ivan Polakof—yes, with Marvin Polakof.

Q. With Marvin? A. Yes, sir.

Q. With Marvin Polakof. When was that? A. About 1939. In 1939.

Q. In 1939? A. Yes, sir.

Q. Do you remember what month it was? A. It was in the summer. It was July.

Q. In July, 1939? A. Yes, sir.

Q. You went with Mr. Polakof. Where did you go with him? A. To a planning commission.

Q. A planning commission? A. In Los Angeles.

Q. And at that time there was a matter with reference to the use of this property, was there not? A. Yes, sir.

Q. At that time did you have a conversation with Mr. Marvin Polakof relative to this property? A. Yes, sir.

Q. At that time did Mr. Polakof make any statement to you as to the ownership of this property? A. No; he did not. I needed Mr. Polakof to sign a zoning variance. I built a shed over there and they required a zoning variance.

Q. *Did you ask Mr. Polakof whether he was the owner of that property.* A. *No. I was so familiar with the situation I didn't have to ask the question. As a matter of fact, I sold the property to them and was very familiar with the conditions.*

Q. *You sold the property to Mr. Marvin Polakof?* A. *Yes, sir.*

Q. You knew that Mr. Polakof owned the property at that time?

Mr. Victor Cogen: Just a minute. I object to that on the ground that it calls for a conclusion of the witness, that he knew that Mr. Polakof owned the property.

Mr. Hindin: I will reframe the question.

The Court: He said he sold it to him.

Mr. Victor Cogen: Well, see if he is referring to 1935 or 1937 or 1939.

A. In 1935. It might have been 1936. I have the lease here. I leased it for them. First I sold it to Mr. Polakof, then I leased it for them.

Q. By Mr. Hindin: You represented Mr. Polakof, after you sold the property to him, for the purpose of leasing it? A. Yes, sir.

Q. When you asked Mr. Polakof to sign this zone variance did you ask him to sign as owner of the property? A. Yes.

The Court: If he signed any lease, produce it, please. I am not going to take secondary evidence.

Q. Mr. Hindin: Do you have that petition, then?

The Court: That is a matter of public record, isn't it?

The Witness: Yes.

Mr. Hindin: Well, it has been my experience that records of the zoning commission are not available.

The Court: Then you will have to establish that fact.

Q. By Mr. Hindin: At any rate, did Mr. Polakof declare to you that he was the owner of the property?

The Court: You have asked him that. He said Marvin Polakof never said anything about owning the property; never made any declaration one way or the other.

Q. By Mr. Hindin: Well, you have a conversation with Mr. Polakof, did you not, at the time you wanted him to sign this variance petition? A. I just asked him to sign it. I told him that the zoning commission required the signature of the owner of the property for the requested variance.

Q. What did he say? A. That he would come up and sign the petition—the request for the variance.

Q. *Between 1935 and 1939 you leased the property for Mr. Polakof?* A. *Yes, sir.*

Q. *Whom did you consult with reference to the terms of the lease?* A. *Mr. Sam Polakof.*

Q. Who was it that leased the property? A. The True-X Chemical Company.

Q. What was the rental value of the property at that time?

Mr. Victor Cogen: Just a minute. We object to it. The lease is the best evidence, if there was a lease.

The Witness: I have a copy here.

Q. By Mr. Hindin: Do you have a copy of the lease here? A. Yes, sir.

Q. Will you produce it for us, please? A. Here it is.

Q. *Was the original of this lease signed in your presence?* A. *Yes, sir.*

Q. *By whom?* A. *Mr. Sam Polakof.*

Q. Was Mr. Marvin Polakof there? A. No, sir.

The Court: Sam signed it? A. Sam; yes.

The Court: Who is Sam? A. The father. The father of Marvin.

Q. By Mr. Hindin: *When you went up to the zoning commission who went with you, Sam or Marvin?* A. *No; only Mr. Marvin Polakof.*

Q. *Marvin Polakof?* A. *I had to go down and ask Mr. Sam Polakof that the owner must sign, and he told me that Marvin Polakof would come up and attend to that.*

Mr. Victor Cogen: We object to that, Your Honor. It is hearsay.

The Court: That is hearsay. It may go out.

Q. By Mr. Hindin: Was Mr. Marvin Polakof there when you had this conversation with Sam? A. No. I arranged a meeting—

Mr. Victor Cogen: Just a minute.

Mr. Hindin: Pardon?

A. I arranged a meeting with Mr. Marvin Polakof for the variance of the zoning commission.

Q. I am talking about this other conversation you had with Mr. Sam Polakof. Was Mr. Marvin Polakof there at the time? A. No.

Q. He wasn't? A. No.

Mr. Hindin: All right. That is all."

And during cross-examination [R. 94-95]:

"Q. *This lease was signed by Sam Polakof, wasn't it?* A. *Sam Polakof; yes, sir.*

Q. *As the owner; is that true?* A. *Yes.*

Q. *You were dealing with him as the owner at that time, were you not?* A. *With Sam Polakof.*

Q. Did Marvin Polakof ever pay any money for the purchase of that property to any escrow transaction, that you know of? A. No.

Q. Did you ever see any money come through Marvin Polakof's hands? A. No, sir.

Q. *The money that you received went through the hands of Sam Polakof, did it not?* A. *Yes, sir; Sam Polakof. My dealings were solely with Sam Polakof."*

Mr. Albright then testified that in 1939 he had gone to the Title Insurance Company with Mr. Cogen, the attorney for the Polakofs, to clear the title to the property. [R. 95-96.] Mr. Albright then gave the following testimony [R. 96-97]:

"Q. By Mr. Victor Cogen: *At the time you went up to the Title Company with me you knew that Ivan Polakof was the owner, did you not?* A. *No, I did not. I asked about that and Mr. Sam Polakof*

told me that the title would have to be placed in Marvin Polakof's name on account of this business condition.

Mr. Victor Cogen: I object to that on the ground it is hearsay.

Mr. Hindin: I think it is very material.

Mr. Victor Cogen: There is no showing what parties were present, or anything else.

The Court: It is hearsay. You invited it, though."

And again [R. 98-100]:

"Q. These dealings that you had were with Sam Polakof, weren't they? A. Yes, sir.

Q. Do you know Ivan Polakof? A. Yes, sir.

Q. Did you have any dealings with him? A. Yes.

Q. With reference to this property? A. Yes, sir.

Q. When did you first talk to him? A. Right after I sold the property to Mr. Polakof through the bankruptcy court.

Q. Did you have any dealings with him in August, 1937? A. I can't say definitely as to that particular date. Our dealings extended over a period of three or four years, nearly constantly, monthly.

The Court: *What was the nature of your dealings with him? A. Mr. Ivan Polakof became the record owner. Mr. Marvin Polakof intended to get married. He came to my office and asked us what he should do; that Marvin Polakof intended to get married and I told him it was better to have the property in his name; that you can't tell what is going to happen in a marital relation, and it would*

be better to have that property in Ivan Polakof's name, he being a single man. That was then done.

The Court: Who was present when that conversation took place? A. No one. He came to my office.

The Court: Who did? A. Mr. Ivan Polakof.

The Court: *Why did you suggest putting it in his name?* A. *Well, we discussed that. I suggested it for the reason that Marvin intended to get married, and he was apprehensive as to what was apt to happen, and they wanted to keep that property intact in their own family.*

The Court: Who told you that? A. Ivan Polakof."

Later on Albright again testified [R. 119-121]:

"The Court: When was this conversation that you had with Ivan concerning the transfer of the property to him? A. That was prior to the marriage of Marvin.

The Court: Who was present at that time? A. Only Mr. Ivan. Mr. Ivan Polakof and myself.

The Court: How did you come to be discussing it? A. We were very friendly. Sam Polakof was a very good friend of mine and we were rather very close friends, and whatever came up—he discussed a lot of personal matters with me, and private matters, construction and building and lease. and so on, and whenever he had any difficulty then he came to me. If he wanted to borrow money and make a loan then I endeavored to hypothecate the property if I could. And we became rather chummy. Very often he brought to me letters which he read to me, telling me his difficulties, and that was one of the reasons we were very close. The change in the prop-

erty occurred when Ivan came over and told me his brother was apt to get married and he was apprehensive as to the marital difficulties which might arise. So then I suggested that they deed this property to Ivan from Marvin.

The Court: *Was anything said at that time as to who owned the property?* A. *We knew who owned the property. That did not have to be discussed. We knew it was Sam Polakof and we didn't have to discuss that. We knew the true picture.*

The Court: But you knew it was in Marvin's name? A. Yes.

The Court: Then you didn't know who actually owned the property? A. Except from the record.

The Court: All you knew was who was the record owner? A. The record owner; that is right.

The Court: *Was there any discussion at that time in which Ivan made any comment about, 'I have money in that property', or something to that effect?* A. *No, he did not.*

The Court: *Or, 'My father has some money in it'?* A. *No; he did not say that. He took it for granted I knew the situation.*

The Court: *You didn't know whose money went originally into it?* A. *Mr. Sam Polakof. He had it*

The Court: But you don't know whether Mr. Marvin Polakof has any money in the property or not? A. No."

Even without the additional documentary evidence which we shall presently discuss, Albright's unbiased and disinterested testimony gives the true key to the manner in which the three Polakofs manipulated the property so as to keep it "intact in their own family". Obviously, for

some unexplained reason, Sam Polakof did not wish to keep either the business or property formally in his own name. Instead, both business and property were so manipulated as to maintain before the world the ostensible prosperity and financial standing of the business and at the same time make sure that the property always "remained intact in their own family".

Following this scheme Sam Polakof told Albright "*that the title would have to be placed in Marvin Polakof's name on account of this business condition*" [R. 96], because Marvin's name was then being used as the owner of the business. When there arose some danger that Marvin's marriage might complicate matters, a deed from Marvin to Ivan was conveniently prepared in 1937 which, however, was kept secret and withheld from record for twenty months. In 1939, when the condition of the business became highly precarious and it was practically insolvent [testimony of Maurice Kahn, accountant, R. 178-195] the deed was finally recorded.

That this scheme was well planned is evident from the result in this case. When the business crashed shortly after Sam Polakof's death and bankruptcy ensued, Marvin Polakof and Ivan Polakof nonchalantly came forth with their story that actually the property always belonged only to Ivan and was placed in Marvin's name only because of Ivan's trip to the east. The fact that they won below and succeeded in retaining the property "in their own family" is proof that good foresight was used by the Polakof family.

We have already shown that the surrounding circumstances and Albright's testimony flatly contradict the story of the Polakof brothers. Moreover, there are additional facts which irrefutably belie the story.

For some unexplained reason it was necessary for the Polakofs to obtain a quit claim deed from certain parties covering this property. *Such a deed was executed to Marvin Polakof and not to Ivan Polakof as grantee on July 12, 1938, and recorded on August 5, 1938.* [Exh. 12, R. 207-209.] This deed was therefore executed nearly a year after August 26, 1937, when Marvin Polakof allegedly conveyed the property to Ivan Polakof. Why was Marvin's name again used in the deed made in 1938? Was Ivan Polakof again taking a trip to the east?

Neither Marvin Polakof nor Ivan Polakof offered any explanation for taking the deed in Marvin's name in 1938. Marvin Polakof even testified that he did not recall the transaction and had never seen the deed. [R. 206.] But the County Recorder's statement that the deed was [R. 209] "*recorded at request of grantee*" is mute and irrefutable proof to the contrary.

Finally, as late as 1940 Sam Polakof listed this property as the most valuable asset of the business in the financial statement on behalf of "Sam Polakof and Sons" which showed a net worth of \$27,623.99. [Exh. 7, R. 147-150.] A full description of the property was given together with its value of \$12,000.00, leaving no doubt as to what was meant. [R. 150.]

Thus, even after the deed from Marvin Polakof to Ivan Polakof had been recorded for several months Sam Polakof, the actual manager of the family's business and property, continued to list the property as an asset of the business.

We have devoted a substantial portion of this brief to a discussion of the facts contained in the record, because we believe that this appeal involves essentially the correctness of the findings of fact. We have attempted to present—in condensed form—all of the material facts which bear upon the disputed issues. If some material facts have been inadvertently omitted, we are certain that they will be considered by the court in its careful reading of the record.

Specification of Errors.

I. The finding that the defendant Ivan Polakof was the owner of the property involved in this action since 1935 and that the defendant Marvin Polakof never had any interest in the property [Findings IV and V, R. 19, 21] is against the weight of and not supported by the substantial evidence.

II. The finding that there was no fraud in the transfer of the record title to the property by the defendant Marvin Polakof to the defendant Ivan Polakof [Findings VIII and IX, R. 22] is against the weight of and not supported by the substantial evidence.

III. The finding that the defendant Marvin Polakof was solvent and had sufficient other property to pay the creditors in April, 1939 [Finding XI, R. 23] is against the weight of and not supported by the substantial evidence.

IV. The conclusions that the defendant Ivan Polakof is entitled to retain ownership of the property [1st Conclusion, R. 23-24] and that the plaintiff is entitled to no relief [2nd Conclusion, R. 24] are erroneous, for they are based upon erroneous findings.

ARGUMENT.

POINT I.

The Finding That the Property Was Owned Solely by Ivan Polakof and That the Creditors of the Bankrupt Business Have No Claim to It Is Against the Overwhelming Weight of the Evidence.

We are aware of the reluctance of an appellate court to disturb the findings of a trial court upon conflicting evidence. But this being an equity case the rule is that:

“Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity.”

Morley Co. v. Maryland Casualty Co., 300 U. S. 185, 191.

In *New York Life Insurance Co. v. Simons*, 1 Cir., 60 F. (2d) 30, 32, the court said:

“This is an appeal in equity, and the case comes here to be heard on the record, except that facts found by the District Judge will be accepted by this court, unless the findings of fact appear to be clearly wrong. For an appellate court to hold that a finding of fact by a sitting justice in an equity case is clearly wrong, it is not necessary that there shall be no substantial evidence to support it; but, if it clearly appears to the appellate court that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the inference of the sitting justice from proven facts is unreasonable, then his finding may be disregarded, and the appellate court determine the facts from the evidence before it, or may draw different conclusions from the facts found.”

The same rule is expressed in *Laurson v. Lowe*, 6 Cir., 46 F. (2d) 303, 304, as follows:

“While much weight is ordinarily, and rightly, given to the opinion of the trial judge who has seen the witnesses upon the stand, noted their demeanor, and heard them testify, yet in an equity appeal the obligation is imposed upon this court of reviewing the record, weighing the evidence, and determining as best we may whether the plaintiff has sustained the burden of proof resting on him.”

We submit that the record in this case clearly calls for a reversal of the trial court's finding that Ivan Polakof was the exclusive owner of the property.

In connection with this finding the trial court said [R. 268]:

“The facts preponderantly show that this property belonged to Ivan from the inception of the transaction. There is no dispute about the fact that Ivan paid off this other co-owner, by a cashier's check, I believe, of something over a thousand dollars. That is one of the strongest evidences of interest in property, to pay off the encumbrance that effects it. I further feel that there is no evidence here that these people did what is ordinarily done when there is a piece of property in one's name, that is, to hold it out to his creditors.”

We believe that the trial court misinterpreted the evidence with respect to both the payment by Ivan of an incumbrance on the property and the holding out to the creditors.

First as to the incumbrance on the property. This consisted of a mortgage by Marvin Polakof to A. Fratkan

for \$1,000.00, when the latter conveyed his half interest in 1936. [R. 159.] That mortgage was signed by Marvin Polakof and not by Ivan Polakof, although Fratkin would probably have known that Ivan Polakof was the owner, if such had been the fact, and would probably have demanded the signature of the real owner. At any rate, the mortgage was not paid until 1939, after the deed from Marvin Polakof to Ivan Polakof had been recorded. [R. 198-199, 223.]

The payment of the incumbrance by Ivan Polakof in 1939 was thus a part of the very fraudulent scheme whereby the property was recorded in Ivan Polakof's name at the time when the business was already in its highly precarious condition. It certainly behooved them to have the payments made by Ivan Polakof after the property had been transferred to his name. But who made the payments for taxes, interest, and other expenses between 1935 and 1939? If Ivan Polakof made such payments during these years, when he was supposedly the owner, why did he not testify or produce any proof about them?

Had the defendants produced some evidence of expenditures for the property by Ivan Polakof before 1939 it would have lent some credence to their story. But the only payments by Ivan Polakof of which there is any proof are the \$1,000.00 in June, 1939, and a check for a tax payment in December, 1939. [Exh. D, R. 220-224, 235.] Where were the checks for the taxes and similar payments for the preceding years?

In *Hann v. Venetian Blind Corp.*, 9 Cir., 111 F. (2d) 455, 459, this court recently said that:

“* * * when there is material testimony which would establish a fact in issue in the present ability of the litigant to present and he fails to do so, and fails to offer a reasonable excuse for such failure, the presumption follows that such testimony, if presented would be against such party * * *”

Is it then not reasonable to presume from the failure of the defendants to produce any proof of expenditures by Ivan Polakof for the property before 1939, that no such expenditures were ever made?

It thus follows that the first premise for the court's decision, *i. e.*, the payment by Ivan Polakof of an incumbrance on the property in 1939, actually was only a link in the chain forged by the Polakofs in order to keep the property “intact in the family.”

The second ground of the court's decision—that the property was not held out to creditors—is even more tenuous.

The court must have referred to the following testimony by Ivan Polakof [R. 252-253]:

“Q. You knew, then, that Marvin was in business for himself, didn't you? A. Yes; I knew that.

Q. And you knew that title to this Baldwin Park property was in his name, didn't you? A. Yes. It is a matter of record. Sure.

Q. And notwithstanding that you knew he was in business and that the property was in his name you

did nothing about it? A. I impressed upon him that he should never hold himself out that he was the owner of that property. And he never entered it on any financial statement, even when it was in his name. Everyone that knew me will say that it was my property. In fact, they didn't know Marvin.

Q. But why did you warn Marvin not to hold it out to his creditors? A. I didn't want him to represent to the creditors that he had that property.

Q. But you knew he had creditors in the business, didn't you? A. But he wasn't getting credit on that particular piece of property."

It is incomprehensible how this testimony could even have been considered, in view of the admitted fact that Sam Polakof arranged all the credits for the business and that Marvin Polakof had nothing to do with representing to creditors, one way or another.

The trial court apparently overlooked the very important fact that as late as March 1, 1940, Sam Polakof, the actual manager of the business, did expressly represent this property as being the most important asset of the business. [Exh. 7, R. 147-150, especially p. 150.]

We summarize the first part of our argument with the conclusion that a careful analysis of the evidence proves overwhelmingly that Ivan Polakof was never the owner of the property herein involved, that the property was always part of the business carried on by the Polakof family under the formal ownership of Marvin Polakof and that the creditors of the bankrupt business—represented by the plaintiff as the trustee in bankruptcy—are legally and equitably just as much entitled to the real property as they are to the other assets of the bankrupt business.

POINT II.

The Transfer of the Property by Marvin Polakof to Ivan Polakof Was Fraudulent and Void as to the Trustee in Bankruptcy.

Section 70e of the Bankruptcy Act (11 U. S. C. A. 110e) provides that:

“The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.”

This section has been construed to give the trustee the right to set aside any transfer which is fraudulent against creditors under the state laws (*Stellwagen v. Clum*, 245 U. S. 605, 614) and to make the state laws applicable in a suit by the trustee to recover the fraudulently transferred property (*Barr v. Roderick*, D. C. Cal., 11 F. (2d) 984, 985).

It is therefore important to examine the laws of California which are applicable to this situation.

Since September, 1939, the Uniform Fraudulent Conveyance Act (Secs. 3439.01-3439.13 of the Civil Code of California) has superseded and broadened the statutory provisions relating to fraudulent conveyances. But since some of the acts of the defendants in this case antedate the adoption of the Uniform Act, it is proper to consider the previously existing statutes and decisions.

Section 3439, Civil Code of California, in effect until September, 1939, provided:

“TRANSFERS, ETC., WITH INTENT TO DEFRAUD CREDITORS. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.”

The fraud covered by this section was of the class generally referred to as actual fraud. It was different from the fraud which is merely constructive, *i. e.*, where there was no fraudulent intent but merely a transfer by an insolvent without consideration, which was covered by Section 3442, Civil Code. (*Hanscombe-James-Winship v. Ainger*, 71 Cal. App. 735.]

In *Borgfeldt v. Curry*, 25 Cal. App. 624, 626, the court said in discussing the said two sections:

“These sections, in common with the remainder of the code, should be liberally construed with a view to effecting their purpose. That purpose undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take hazards and risks thereof as well as the chances for profit. If misfortune should overtake him he must face it himself, and not attempt to saddle it on to those who have extended him credit and trusted in his commercial integrity.”

We believe that the evidence unquestionably shows that the transfer of the real property to Ivan Polakof was an integral part of a continuous course of intentionally fraudulent conduct by the bankrupt and his relatives.

It is an accepted axiom that fraud can never be proved directly but must be spelled out from the circumstances.

It is needless to repeat the various facts and circumstances previously discussed which inevitably point to a conspiracy to keep the property "intact in the family" under all circumstances. We only wish to stress one circumstance—the withholding of the deed by Marvin Polakof to Ivan Polakof from record for twenty months—which was commented upon in *Bush & Mallet Co. v. Helbing*, 134 Cal. 676, 681, as follows:

"The fact that a deed is kept secret and not recorded is a very potent badge of fraud."

There was some testimony and discussion at the trial about the solvency or insolvency of the business in 1939, when the deed from Marvin Polakof to Ivan Polakof was recorded. [R. 178-195.] In its decision the court commented on that question and stated that [R. 269] "the accountant figured out they were solvent by about \$37, but he stated that figure might vary as much as \$500 one way or the other."

Even if insolvency were an important element of plaintiff's cause of action, it was amply established by the evidence. When a transfer is made without consideration—Marvin Polakof received only \$10.00 for his deed to Ivan

Polakof [R. 38]—the fact that the transferor is solvent by a few dollars does not validate the transfer in so far as creditors are concerned.

As was said in *Borgfeldt v. Curry*, 25 Cal. App. 624, 627:

“The principal argument in the briefs of both appellant and respondent is addressed to the question as to whether at the time of the transfer Borgfeldt was actually solvent or insolvent. Appellant constructs from the testimony a table of assets and liabilities, which he contends show Borgfeldt to be insolvent. Respondent takes the same table, and contends that it proves the contrary. The difference between them arises from the item of one thousand dollars, previously referred to as having been put into a new business on the day preceding the transfer, the appellant contending that this sum should not be regarded as assets, and the respondent contending that it should, and that so regarding it, the assets of Borgfeldt were superior to his liabilities by the sum of about three hundred dollars. In the view we take of the case, however, it matters not whether this sum is included in Borgfeldt’s assets or not. Admitting that by a small margin he may be shown to have been solvent, it still remains patent from the evidence that the transfer was made in contemplation of insolvency, and as such, is equally within the terms of the sections of the code cited.”

But the question of solvency or insolvency is actually of no importance when intent to defraud is shown. As

was said in *First National Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 372:

“In Bigelow on Fraud, Volume 2, page 393, it is said ‘Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm anyone, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors’; and in *Hager v. Schindler*, 29 Cal. 60, it was said: ‘A rich man may make a fraudulent deed as well as one who is insolvent.’ ”

In *Benson v. Harriman*, 55 Cal. App. 483, 485, the court said:

“Moreover, the rule in this state is that if a conveyance is made with intent to defraud creditors, it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors.”

Consequently, the finding of the trial court [Finding XI, R. 23] that Marvin Polakof was solvent in 1939 is of no importance, even if it had been based upon sufficient evidence, which we seriously dispute.

With respect to the findings of the trial court that there was no fraud in the transfer of the property by Marvin Polakof to Ivan Polakof [Findings VIII and IX, R. 22], they are based solely upon the statements of the two defendants. This uncorroborated testimony is opposed to the great weight of the evidence, documentary and disinterested, which revealed the manipulations of the property

in order to keep it from creditors. It is therefore of no probative value.

The situation is similar to that involved in *Benson v. Harriman*, 55 Cal. App. 483, where a fraudulent grantor also denied vehemently that he had intended to defraud his creditors. The court said (p. 489):

“Quite naturally, the defendant, Frank G. Harri-
man, denied that he had any intention of defrauding
the plaintiff and he even went so far as to claim that
he was able and willing to pay the plaintiff what he
owed him. But his actions speak louder than words
and his declared willingness to pay could avail nothing
in the face of the determined efforts that were
required to collect the judgment.”

In *Knox v. Blanckenburg*, 28 Cal. App. 298, 301, the
court commented on similar testimony as follows:

“The inevitable result of this act on the part of
the defendant Theodore was to hinder and delay his
creditors in the enforcement of their just claims. His
own bare statement, unsupported by any facts that in
giving the property to his wife he did not intend to
hinder or delay his brother in collecting his debt, can-
not overcome the presumption that he intended the
inevitable consequences of his willful and intentional
acts.”

Conclusion.

We earnestly believe that the evidence unequivocally shows that the defendants have succeeded, by means of a well planned but fraudulent scheme, in retaining from the creditors the real property which was the most valuable asset of the bankrupt.

In the words of the Supreme Court of California in *Tobias v. Adams*, 201 Cal. 689, 696:

“If a transaction of this kind were upheld by the courts then fraud uncurbed and brazen would stalk over all the land.”

We therefore respectfully ask that the judgment appealed from be reversed and judgment granted to the plaintiff as demanded in the complaint.

Respectfully submitted,

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No. 10117.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the
Estate of Marvin Polakof,

Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,

Appellees.

APPELLEES' BRIEF

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FILED

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PAUL P. O'BRIEN,
CLERK

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Appellees.

APPELLEE'S BRIEF.

Statement of the Case.

Two main issues were formulated by the pleadings and the evidence before the trial court:

I. Who was the actual owner of the real estate involved in this lawsuit—Ivan Polakof or Marvin Polakof?

II. Was the transfer of the property by Marvin Polakof to Ivan Polakof fraudulent?

After a bitterly contested trial, before a capable and conscientious judge, the trial court found:

I. That Ivan Polakof was the actual owner of the real estate. [Finding V, R. 21.]

II. That Marvin Polakof never had any interest or ownership of the real estate. [Finding V, R. 21.]

III. That the transfer of the property by Marvin Polakof to Ivan Polakof was not fraudulent. [Findings VIII and IX, R. 22.]

IV. That Marvin Polakof never represented or held himself out to be the owner of the aforesaid real property. That none of the creditors of Marvin Polakof, extended to the defendant, Marvin Polakof, any credit or delivered any merchandise, services or personal property, relying on the record ownership of the Baldwin Park property by the defendant, Marvin Polakof. [Finding VI, R. 21.]

V. That on or about the 26th day of August, 1937, to and including April 30, 1939, Marvin Polakof, was solvent and that the gross amount of his assets exceeded the gross amount of his liabilities. That on August 26, 1937, to and including April 30, 1939, the defendant, Marvin Polakof, had sufficient funds and/or property other than the Baldwin Park property, sufficient to pay his then creditors any sums of monies due them. [Finding XI, R. 22-23.]

The appellees firmly believe the findings are in accordance with the weight of evidence produced at the trial. Judge Ben Harrison tried this case without a jury; substantially no material evidence was excluded (there is no appeal or discussion of any excluded evidence in the appellant's briefs); the plaintiff's case is tersely as follows: "I think the facts are very weak. The facts preponderantly show that this property belonged to Ivan from the description of the transaction." [R. 225.]

Summary of the Evidence.

The appellant's summary of the evidence, in the opinion of the appellees, is not correct. What appellant attempted to do in his summary of the evidence was to quote principally from the appellant's evidence, in order to overcome the presumption that the judgment is supported by the evidence and the findings of fact. (See pages 9 to 16, inclusive, of Appellant's Brief.) In order to meet this abortive attempt, the appellees here give a brief summary of the evidence which supports the findings and the judgment.

The evidence can be briefly summarized as follows:

Ivan Polakof and Marvin Polakof were brothers. Sam Polakof was their father. He died prior to the commencement of this litigation.

Ivan Polakof was originally the owner of the wine business known as the Ace Distributing Co., located at 784-786 Kohler street, Los Angeles, California. In 1935 Ivan Polakof went to work for the Southern California Winery. At that time he turned over to Marvin Polakof, as a gift, the business of the Ace Distributing Co. [R. 208.]

In December, 1935, Ivan Polakof was approached by his father, Sam Polakof, and a Mr. A. Fratkin to purchase the real estate (the subject of this litigation), which is referred to in the pleadings and evidence as the Baldwin Park property. This property was to be bought as a speculation to be resold for a profit in a short time. [R. 183-184.] Ivan Polakof was scheduled to go to school in Missouri. Inasmuch as Ivan Polakof would not be available to sign and negotiate a quick resale of the Baldwin

Park property, Ivan Polakof decided to have the property bought in the name of A. Fratkin and Marvin Polakof. At the sale of this property in a bankruptcy proceeding, the price for which it was sold exceeded the expected sale price. Ivan Polakof for his one-half needed \$1300.00. He had \$800.00 of his own and borrowed \$500.00 to complete the purchase price. Marvin Polakof did not furnish any portion of the purchase price. [R. 168, 186, 187, 188.]

The anticipated quick resale of the Baldwin Park property failed to materialize. Ivan Polakof had gone back east to school. Thereafter, Mr. A. Fratkin wanted to be paid off. Accordingly, in 1937, Ivan Polakof purchased the interest of A. Fratkin. As part of the consideration of the sale to Ivan Polakof of Mr. Fratkin's one-half interest in the Baldwin Park property, Mr. Fratkin was given a trust deed for \$1000.00 secured by the Baldwin Park property. [R. 180.] Ivan Polakof still thought there would be a quick sale. The federal government was contemplating the purchase of this property. At Ivan Polakof's request, and for the above reasons, Mr. A. Fratkin conveyed his one-half interest in the property to Marvin Polakof.

Thereafter, Marvin Polakof became engaged to be married and went to Omaha, Nebraska, to live. In August, 1937, Ivan Polakof was fearful of the complications that might arise through the expected marriage and possible community property rights. On the advice of the appellant's witness, E. K. Albright, Ivan Polakof had a quit claim deed to the Baldwin Park property prepared and mailed to Marvin Polakof. [R. 80, 81, 184.] Marvin Polakof, before he was married on or about August 26, 1937, signed and executed this quitclaim deed transferring

the Baldwin Park property to Ivan Polakof. On or about August 26, 1937, at Omaha, Douglas County, Nebraska, Marvin Polakof had the quitclaim deed to the Baldwin Park property notarized and mailed at once to Ivan Polakof. [R. 6-167.]

On or about June 7, 1939, Ivan Polakof paid off the \$1000.00 due on the aforesaid \$1000.00 trust deed, given to Mr. A. Fratkin in 1937. Ivan Polakof did not have the cash monies then available, so he borrowed the sum of \$1000.00 from the California Bank on Ivan Polakof's property referred to herein as the Riverside Drive property. [R. 180.] Before 1935, Ivan Polakof's grandfather made a gift of the Riverside Drive property to Ivan Polakof, a single man. [R. 180.] The original loan, dated September 5, 1936, by the California Bank on this property was \$3000.00 [R. 180], and was paid down by Ivan Polakof to \$895.37 in May, 1939. [R. 176-180.] On or about May 9, 1939, Ivan Polakof borrowed an additional \$1000.00 from the California Bank, and gave as security the Riverside Drive property. [R. 176-177.] Said Ivan Polakof's note to the California Bank for \$1000.00 and the balance of \$895.37, due to the California Bank in May, 1939, were paid off in an escrow on June 17, 1939, wherein Ivan Polakof sold to William H. Rivkin and Anna Rivkin for the sum of \$4500.00 the Riverside Drive property. [R. 163-164.] Through this escrow on June 17, 1939, the California Bank was paid off the \$1939.33 due, and the balance of the purchase price was paid to Ivan Polakof. [R. 164-165.]

Ivan Polakof received \$909.20 as the proceeds of his \$1000.00 loan made on May 23, 1939, by the California Bank at its main office. [R. 178-179.] On or about June 7, 1939, Ivan Polakof went to the California Bank,

Market & Produce Branch, withdrew \$155.20 from his commercial account. With part of the \$155.20 and with the net proceeds of his \$1000.00 loan from the California Bank, Ivan Polakof purchased a cashier's check Number 11-10025 for \$1039.40, issued by the California Bank in favor of A. Fratkin [R. 159-181-182-183], which cashier's check was endorsed by A. Fratkin and cashed on June 9, 1939. [R. 159-160.] The purchaser of the check was Ivan Polakof. [R. 160.] Marvin Polakof did not pay any part of the monies paid to Mr. A. Fratkin by Ivan Polakof. [R. 168.] Thus, the \$1000.00 deed of trust in Mr. A. Fratkin's favor was paid off on June 9, 1939. [R. 159-160.]

After securing the deed from Marvin Polakof in 1937, on the advice of Mr. E. K. Albright, Polakof did not record the deed until he was ready to get a certificate of title. [R. 184.] Accordingly, having paid off Mr. Fratkin on June 9, 1939, Ivan Polakof secured a reconveyance of the said deed of trust. On or about June 26, 1939, Ivan Polakof requested the Title Insurance & Trust Co. to issue a policy of title insurance. This policy of title insurance, Number 7,630,600, was issued by the Title Insurance & Trust Co. on or about June 26, 1939, showing the Baldwin Park property vested in Ivan Polakof, a single man. [R. 184-185.]

At the time the Baldwin Park property was purchased in 1935 for \$2600.00 at the court sale, Ivan Polakof had \$800.00 cash, and borrowed \$300.00 from his uncle Rudy in order to purchase a one-half interest with Mr. A. Frat-

kin. At the date of the sale, the price was \$400.00 higher than expected, so Ivan Polakof borrowed \$200.00 from his father to complete the purchase price. Marvin Polakof did not loan any monies to Ivan Polakof in order to complete the purchase price. [R. 188.] Ivan Polakof had made considerable monies prior to 1935, to-wit, \$10,000.00 in one winery deal within two years prior to this deal, and paid an income tax on \$8,000.00 [R. 188], and was employed at the Monte Christo Winery in 1935 [R. 188] and has been a wine chemist since then. [R. 188.]

Since the purchase of the Baldwin Park property in 1935, Ivan Polakof exercised exclusive control over the property. [R. 188.] He had paid all the taxes on the property. The first year after the purchase, the Baldwin Park property was leased by the True-X Chemical Company, who paid the taxes [R. 191], and thereafter by Ivan Polakof's checks made payable to the Tax Collector of Los Angeles County. [R. 191.]

Also, Ivan Polakof paid for the water stock appurtenant to the land, to-wit, five shares of Connemara Mutual Water Co, part of which came from the rental paid by the True-X Chemical Co., and the balance of the water stock was paid by Ivan Polakof. [R. 99-192.] This water stock was issued in the name of Ivan Polakof on or about October 11, 1937, some time after Marvin Polakof, on August 26, 1937, had delivered the deed for the Baldwin Park property to Ivan Polakof. [R. 99.] Mr. E. K. Albright, the appellant's witness, testified, the stock was issued in Ivan Polakof's name in 1937 (after

the transfer of the Baldwin Park property by Marvin Polakof) because Ivan Polakof was the owner of the Baldwin Park property, and the water stock had to run with the land and be issued in the name of the owner of the land. [R. 98.]

Marvin Polakof never paid any portion of the original purchase price of the Baldwin Park property in 1935 [R. 168, 182, 188], paid no part of the cost of the water stock that was appurtenant to the land [R. 99, 192], paid no part for the purchase of Mr. A. Fratkin's interest in the property in 1937, and paid no part of the trust deed held by Mr. Fratkin in 1939, given as part of the purchase price of Mr. A. Fratkin's interest in the property [R. 159-160], paid no taxes levied against the property [R. 191], and paid no monies for the repairs to the property [R. 192], and exercised no control over the property. [R. 169, 170, 188.]

Ivan Polakof paid the original purchase price of the Baldwin Park property in 1935 [R. 188], paid for the water stock that was appurtenant to the land [R. 99, 192], paid for the purchase of Mr. A. Fratkin's interest in the property in 1937, and paid the trust deed due to Mr. A. Fratkin in 1939, to-wit, the consideration for purchasing Mr. A. Fratkin's interest [R. 159, 160], paid all taxes levied against the property [R. 191], and paid the monies for the repairs to the property. [R. 192.]

Further, the facts disclose that at the time of the transfer of the record title of the Baldwin Park property to Marvin Polakof in 1935, Ivan Polakof told Marvin Pola-

kof that he should never hold himself out as the owner of the Baldwin Park property, never set forth the Baldwin Park property as his asset in any financial statement, and never secure credit on the basis of the ownership of said Baldwin Park property. [R. 209.]

The facts disclose that no financial statement was ever issued by Marvin Polakof claiming to be the owner of the Baldwin Park property. [R. 126, 130, 153, 154.] Marvin Polakof never told anyone he owned the Baldwin Park property [R. 130], and never exercised any control over the property. [R. 169, 170.]

The facts disclose that no creditor ever gave any credit to Marvin Polakof with the knowledge that Marvin Polakof owned the Baldwin Park property. In fact, not one of the creditors who testified knew that Marvin Polakof owned the property until after the bankruptcy of Marvin Polakof in 1940. There were four creditors of Marvin Polakof who testified in court that monies were due to them in April 24, 1939. Not one unsecured creditor claimed any monies were due on August 26, 1937, the date of the delivery of the deed. The May Co., whose claim was \$18.96, through Miss Kuhne Jantzen, testified that the monies became due by Marvin Polakof to them in May, 1937, based upon a conditional sales contract for a man's suit; there was no representation that Marvin Polakof owned the Baldwin Park property. [R. 42-43.] The Royal Credit Jewelers, whose claim was \$67.71, through Gary Freeman, testified that the monies became due by Marvin Polakof to them on April 24, 1939, based upon a

conditional sales contract for jewelry; there was no representation that Marvin Polakof owned the Baldwin Park property. [R. 48.] Elmer J. Walthers, an attorney, testified that Marvin Polakof owed him \$100.00 for professional services, due as of April 7, 1939. He could not testify whether the claim was for services rendered before August 26, 1937. He did not rely upon the ownership of the Baldwin Park property by Marvin Polakof. In fact, he did not rely upon anything in particular for the payment of the bill. [R. 37-38-39.] The largest creditor of Marvin Polakof was the Acampo Winery. Their representative, H. E. Graeber, testified that they had no financial statements in their files of any kind issued by Marvin Polakof prior to 1940 as the basis for extending credit to Marvin Polakof, doing business as the Ace distributing Co. [R. 101.] He testified that the Acampo Winery had sold about \$5,000.00 worth of merchandise each and every month since 1937 to the Ace Distributing Co., and was paid off within sixty days after the merchandise was delivered, the last delivery being made on June 30, 1940. [R. 16, 17, 25.] They had no knowledge that Marvin Polakof owned the Baldwin Park property until after the bankruptcy proceedings began in 1940. [R. 27-28.] That, except for a disputed bill of \$2000.00 for which trade acceptances were not given until two years after the delivery, all money due to Acampo Winery were incurred within ninety days prior to the bankruptcy in 1940, and subsequent to the transfer of title by Marvin Polakof to Ivan Polakof of the Baldwin

Park property. Further, that in 1940, an accounting was had between the Acampo Winery and Marvin Polakof, and the Acampo Winery accepted Marvin Polakof's notes endorsed by one, Percy Barker, and \$2000.00 in cash in settlement of their account, including the disputed bills referred to.

Summarized, the facts disclose that on or about August 26, 1937, Marvin Polakof was solvent and was paying his bills in the regular course of business. There were no suits or threatened suits by any of his creditors against Marvin Polakof. The creditors of Marvin Polakof had no knowledge that Marvin Polakof was the purported owner of the Baldwin Park property and extended no credit based upon his purported ownership of the Baldwin Park property. [R. 153.] That on or about April 24, 1939, Marvin Polakof was solvent, paying his bills in the regular course of business, there were no suits or threatened suits by any of his creditors for the payment of his bills, and the creditors of Marvin Polakof had no knowledge that Marvin Polakof had been the purported owner of the Baldwin Park property, and extended no credit based upon his purported ownership of the Baldwin Park property. Marvin Polakof had a good reputation of paying his business debts, a little slow, but he always paid these bills. [R. 153, 154.] That no suit was threatened against Marvin Polakof until August, 1940. [R. 155.]

Further, the bankruptcy did not take place until eighteen months after the recording of the deed from Marvin Polakof to Ivan Polakof, to-wit, August, 1940.

Statement of the Court at the Trial.

“I think there is plenty of law on your side, but I think the facts are very weak. The facts preponderantly show that this property belonged to Ivan from the inception of the transaction. There is no dispute about the fact that Ivan paid off this other co-owner, by a cashier’s check, I believe, of something over a thousand dollars. That is one of the strongest evidence of interest in property, to pay off the encumbrance that effects it. I further feel that there is no evidence here that these people did what is ordinarily done when there is a piece of property in one’s name, that is, to hold it out to his creditors. [R. 268.]

* * * The burden in the case of fraud is always on the plaintiff. This encumbrance took place in 1937. The evidence is that they were solvent at that time. The fact that they took the transfer in 1939 is a question of whether they were solvent or insolvent. The accountant figured out they were solvent by about \$37, but he stated that figure might vary as much as 500 one way or the other. It was an estimate. But the original transaction took place years before, and the recording of it. There was no pressing of creditors at the time this deed was recorded, and the bankruptcy did not take place until 18 months after. [R. 269.] * * * And if I were to hold in favor of the plaintiff in this case I would do exactly that, because it hasn’t any of the badges of fraud. There is no evidence that any creditor has been misled in any way, shape or form by the fact that this title was in the name of Marvin. The fact is that the evidence has not disclosed that any of them knew of it.” [R. 270.]

ARGUMENT.

I.

The Finding of the Court That the Baldwin Park Property Belonged Solely to Ivan Polakof and Not to Marvin Polakof Is in Accordance With the Weight of the Evidence.

This case arose in the State of California. All parties were citizens of the State of California, to-wit, the plaintiff, all the creditors, and all the defendants. The property was located within the boundaries of the State of California. Therefore, this case is governed by the laws of the State of California.

In the present case, the appellant failed to show any scheme or conspiracy by Ivan Polakof to defraud any of Marvin Polakof's creditors. Were there any of the usual badges of fraud and conspiracy? No! The evidence is clear and convincing that there was no scheme or conspiracy actual or inferable to defraud Marvin Polakof's creditors. Marvin Polakof paid no part of the consideration for the purchase of the property, paid no part of the taxes or upkeep, never held himself out as the owner of the property, never secured any credits on the understanding that he owned the property, never issued any statement that he owned the property. Further, no creditor claimed he gave credit on the basis of Marvin Polakof's owning the property. On the contrary, not a single creditor knew that Marvin Polakof was the purported owner of the property. Even the largest creditor, the Acampo Winery, which sold \$5000.00 a month merchandise to Marvin Polakof since 1935, and whose accounts had normally been paid within 60 days of the date of the delivery, never had a financial statement from Marvin Polakof claiming the ownership of the Baldwin Park

property. (For the sake of clarity, the real estate referred to in Plaintiff's Exhibits 8 and 9, dated October 20, 1940, and October 24, 1940, was the property on Kohler Street, where the Ace Distributing Co. was located, subject to an incumbrance of \$10,500.00? [R. 125.]) There never was an attempt by Marvin Polakof to secure monies or creditors on the basis of an alleged ownership of the Baldwin Park property, and no credit or monies were ever secured on that basis. So no creditor could have been thus defrauded.

While appellant has tried to point out conflicting evidence, which might cast some reflection on the statements and acts of the appellees, the appellant had the burden of proof to establish fraud by clear and convincing evidence. The appellant has failed to do so.

All the parties testified before the court, there was a complete cross-examination of all witnesses, all of the appellant's evidence was admitted. The trial court had the full and complete opportunity of seeing and hearing the witnesses.

The case merely presents a conflict in the evidence offered before the trial court, and the court resolved the conflict against the appellant.

There was substantial and ample evidence to support the court's findings. With the conclusions of the trial court as to the weight to be given to conflicting evidence, this court should not interfere.

“Where fraud is alleged, as by appellant here, he assumes the burden of establishing his charge, and the presumptions of honesty and fair dealing must be overcome by evidence of convincing force.”

Hedden v. Waldeck, 9 Cal. (2d) 631, 72 P. (2d)

“Conceding the utmost to appellant’s arguments and disregarding for the moment the inadequate state of the record herein, there is disclosed nothing more than a conflict in the evidence offered before the trial court, and the court resolved that conflict against appellant. With the conclusions of the trial court as to the weight to be given to conflicting evidence this court will not interfere.”

Fares v. Morrison, 4 Advance Cal. App. Dec. 1022, 1024 (decided October, 1942.)

The evidence clearly indicates that no creditor knew of the transaction, that no creditor gave credit and monies to Marvin Polakof on the basis of the purported ownership of the property by Marvin Polakof, that no creditors knew Marvin Polakof purportedly owned the property. Therefore, they could not have been defrauded. Marvin Polakof, both on August 26, 1937, the date he executed and delivered the deed to Ivan Polakof, as well as on April 24, 1939, the date Ivan Polakof recorded the deed, was solvent and paying his bills in the regular course of business. There were no suits or threatened suits for the payment of monies by any creditors of Marvin Polakof until 1940, nearly 18 months after the deed was recorded. The only credit extended to him prior to the delivery of the deed was based on conditional sales contracts. Not one of the creditors testified that the property sold under conditional sales contract was worth less than the obligations by Marvin Polakof. A secured creditor cannot be defrauded if the security is equal or exceeds the value of the obligation. Further, the secured creditors knew nothing of the purported ownership of the property by Marvin Polakof in 1937. The attorney, Elmer J. Walthers, testified that he gave credit of \$100.00 on just Marvin Pola-

kof alone, and did not rely on anything in particular for the payment of the bill. The obligation due to the largest creditor, the Acampo Winery, accrued within 90 days of the bankruptcy, to-wit, in the year 1940. The last delivery of merchandise was on June 30, 1940. Further, they accepted \$2000.00 cash and notes of Marvin Polakof endorsed by Percy Barker in the year 1940 for Marvin Polakof's obligation, if any, incurred prior to the year 1940. They gave \$5000.00 monthly credit to the business because of the payment of its obligation, and not on the basis of any financial statement. Further, Acampo Winery knew nothing of the ownership of the Baldwin Park property until after the bankruptcy in the fall of 1940. They gave no credits on the purported ownership of the Baldwin Park property by Marvin Polakof.

The appellant failed to produced evidence that any unpaid and unsecured creditors existed at the time of the transfer of the Baldwin Park property on August 26, 1937.

The appellant makes much of the failure of Ivan Polakof to record the deed. As testified by the appellant's witness Albright, and by Ivan Polakof, upon Mr. Albright's advice, Ivan Polakof waited until he was about ready to pay off Mr. A. Fratkin's trust deed and bring down the title, before Ivan Polakof recorded the deed. As soon as Mr. Fratkin was paid, the title was actually brought down by the Title Insurance and Trust Company on August 26, 1939, at the request of Ivan Polakof and showed the property to be owned by Ivan Polakof.

The most striking evidence of good faith and the most potent evidence of the lack of fraud or conspiracy to defraud is shown by the following summary of the facts:

1. Ivan Polakof paid the purchase price for his one-half interest in the property from his own funds.

2. Ivan Polakof had funds of his own, as he had earned \$10,000.00 in one year prior to 1935.

3. Marvin Polakof paid no part of the original purchase price.

4. Ivan Polakof, in 1939, from his own funds paid off the trust deed given to Mr. A. Fratkin to purchase his interest in the remaining one-half of the property.

5. Ivan Polakof explained by competent evidence the source of the funds in 1939, to-wit, the proceeds of the loan on his Riverside Drive properties.

6. Marvin Polakof paid no part of these monies used to pay off Mr. A. Fratkin in 1939.

7. Ivan Polakof paid for the water stock appurtenant to the land, in the year 1937, soon after the property was transferred to him by Marvin Polakof, and by Mr. A. Fratkin.

8. Marvin Polakof paid no part of the monies paid for the water stock.

9. Ivan Polakof paid the taxes and repairs of the property since 1935.

10. Marvin Polakof paid no part of the taxes and upkeep of the property since 1935.

The usual badges of fraud are entirely absent. Not one cent of Marvin Polakof's property or monies was used to purchase the real property, or the water stock, or for the taxes and upkeep. Marvin Polakof's creditors might have been entitled to recover any monies paid by Marvin Polakof for the purchase of the real property or water stock or taxes or upkeep. Certainly, in good conscience, they are not entitled to recover anything if none of Marvin Polakof's monies or assets were used to purchase the property or used to pay upkeep or taxes. Inasmuch as Marvin Polakof paid no monies, he certainly has no rights to be reimbursed. Accordingly, Marvin Polakof's creditors stand in his shoes and have no rights to be reimbursed or to have any rights in the Baldwin Park property.

If Ivan Polakof were interested in defrauding creditors, would he have paid the entire purchase price from his own funds, disclosed fully the source of his funds, paid with his own funds for the water stock and had it issued in his name in 1937, paid off the \$1000.00 due Mr. A. Fratkin in 1939 for Fratkin's half interest, paid with his own funds all the taxes and upkeep? The answer is no! Actions speak louder than words. Ivan Polakof acted as an owner in good faith, and without the slightest fraudulent intention.

II.

Where a Grantee Merely Holds Property as Trustee for the Grantor, Such Property Is Not Subject to the Debts of the Grantee, and May Not Be Reached by the Grantee's Creditors.

Goldberg Bowen & Co. v. Demick, 77 Cal. App. 535, 542; 247 P. 261:

“As defendant tacitly concedes, where one who holds property as trustee for another under a resulting trust conveys to that other the property so held, neither the creditors nor the trustee in bankruptcy of such grantor can attack the conveyance. (Citing *Nishi v. Downing* (1937), 21 Cal. App. (2d) 1, 3 (67 P. (2d) 1057); *Zeller v. Knapp* (1933), 135 Cal. App. 122, 123 (26 P. (2d) 704); *Bank of Cottonwood v. Henriques* (1928), 91 Cal. App. 88, 95 (266 Pac. 836); *Murphy v. Clayton* (1896), 113 Cal. 153, 159 (45 Pac. 267).)” * * *

“The trust here was properly proved by parol evidence. Even though it be regarded as an express trust, orally agreed upon, and in this respect running counter to the provisions of section 852 of the Civil Code requiring a writing for that purpose, plaintiff's husband, who might have objected to its validity on that ground, has instead, carried it out. The defendant is not, thereafter, in position to assert its invalidity on that ground. (Citing *Polk v. Boggs* (1898), 122 Cal. 114, 116 (54 Pac. 536); *Nishi v. Downing*, *supra* (1937), 21 Cal. App. (2d) 1, 3.)

Owings v. Laugharn, 53 Adv. Cal. App. Dec. 1004, 1006-1009, decided August 5, 1942. A petition for hearing in the Supreme Court of California was denied in September, 1942.

“Though several points are advanced in the briefs, the controlling question is whether the creditors may take property standing in the name of the judgment debtor which he holds merely as trustee for another. That such property cannot be subjected to the payment of the debts of the trustee is settled by unquestioned authority.”

To the same effect:

Nishi v. Downing, 21 Cal. App. (2d) 13, decided in 1937.

Zeller v. Nett, 135 Cal. App. 122, 127, 128.

“It is well settled that the party setting up the trust must show the money was paid by him at or before the execution of the conveyance. (Citing Sec. 853, Civ. Code; *Murphy v. Clayton*, 113 Cal. 153 (45 Pac. 267); *Case v. Coddington*, 38 Cal. 193; *Breeze v. Brooks*, 71 Cal. 169 (9 Pac. 670, 11 Pac. 885); *South San Bernardino Land & Investment Co. v. San Bernardino National Bank*, 127 Cal. 245 (59 Pac. 699); *Polk v. Boggs*, 122 Cal. 114 (54 Pac. 536); *Moultric v. Wright*, 154 Cal. 520 (98 Pac. 257); *Lincoln v. Chamberlain*, 61 Cal. App. 399 (214 Pac. 1013); *Pomeroy's Equity Jurisprudence*, Sec. 1033; *Brown v. Spencer*, 163 Cal. 589 (126 Pac. 493); *Webb v. Vercoe*, 201 Cal. 754 (54 A. L. R. 1200, 258 Pac. 1099).) It follows, therefore, that William R. Henriques was not the owner of the property in question, but was only the trustee for Frank R. Henriques, the real owner, and that William R.

Henriques had no interest in the lands in question, to which the lien of appellant's judgment could attach.

"The law is also well settled that a bankrupt may continue to discharge his duties as a trustee, and trust property in his possession does not go to his assignee or to his creditors. (*Hayford v. Wallace*, 5 Cal. Unrep. 476 (46 Pac. 293); *Perry on Trusts*, Sec. 346.)

"Therefore, William R. Henriques, having no interest in the lands to which appellant's judgment could attach, it is wholly immaterial whether he was solvent or insolvent, or contemplated insolvency when he made the deed of the trust property to his sister, Marie E. Henriques.

"It is next contended by appellant that the intervener Frank R. Henriques is estopped from asserting title to the property in question for the reason that he voluntarily placed the title of record in the name of William R. Henriques. There is no merit in this contention. The intervener did absolutely nothing other than to permit his property to stand of record in the name of William R. Henriques." * * *
"Indeed, the court found upon sufficient evidence that the bank loaned the \$3,500 solely and alone upon the security of the chattel mortgage upon the cattle.

"It was necessary for the appellant, in order for it to prevail in this action, to show that Frank R. Henriques was in some way privy to William R. Henriques' obtaining credit from the bank, or that in gaining such credit, the bank relied upon some affirmative statement or act of Frank R. Henriques, other than his permitting the title to stand of record in the name of William R. Henriques, and the mere fact that Frank R. Henriques allowed the title to the land to stand of record in the name of William R.

Henriques is unavailing to appellant, unless it established to the satisfaction of the court that they relied thereon as an inducement to give credit to William R. Henriques (*Breeze v. Brooks*, 97 Cal. 75 (22 L. R. A. 257, 31 Pac. 742); *Murphy v. Clayton*, *supra*), but, as we have seen, the findings of the trial court negative any such contention.

“It does not appear that the deed from William R. Henriques to Marie E. Henriques was made to hinder, delay or defraud the bank; on the contrary, it was made simply to transfer the bare legal title to the land from William R. Henriques to Marie E. Henriques.”

Bank of Cottonwood v. Henriques, 91 Cal. App. 88, 95-96.

The present case, in accordance with the hereinbefore stated facts as found by the court to be true, is on all fours with the cases cited under this subdivision. Ivan Polakof paid for the purchase of his one-half interest in the Baldwin Park property and paid thereafter for the purchase of Mr. A. Fratkin's one-half interest in the Baldwin Park property. The title was placed in Marvin Polakof's name merely as a naked trustee for the purpose of holding title. Ivan Polakof paid all the money expended for the water stock, for the upkeep and taxes. None of Marvin Polakof's creditors gave any credit to Marvin Polakof, or advanced monies or sold him merchandise on the basis of Marvin Polakof's purported ownership of the Baldwin Park property. In fact, no creditor knew of the purported ownership of Marvin Polakof of the Baldwin Park property until after the bankruptcy of Marvin Polakof. The cases cited under this subdivision should control this case.

Conclusion.

Ivan Polakof earnestly believes that the evidence unequivocally shows that Ivan Polakof acted in a *bona fide* manner in all of his transactions; that he did not defraud or intend to defraud any creditors of Marvin Polakof; that none of the creditors were defrauded, expressly or impliedly, and that not one cent of Marvin Polakof's monies were used to purchase the Baldwin Park property in 1935 or 1939, or to pay for the upkeep or taxes or for the purchase of the water stock.

The appellees, therefore, respectfully ask that the judgment appealed be affirmed.

Respectfully submitted,

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No. 10117.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the
Estate of Marvin Polakof,

Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,

Appellees.

APPELLANT'S REPLY BRIEF.

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FILED

DEC 30 1942

PAUL P. O'BRIEN,
CLERK

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APPELLANT'S REPLY BRIEF.

I.

In their brief the appellees have carefully refrained from discussing the principal fact which appears undisputedly from the evidence, *i. e.*, that it was their father, Sam Polakof, who conducted the business and managed the real estate as the property of the family and that there was no real line of demarcation where the interests of Ivan Polakoff ended and those of Marvin Polakoff began.

Instead, the appellees have again relied upon the fiction that Ivan bought the property, that it never belonged to Marvin, that it was not held out to the creditors of the business, etc.

In our main brief we have summarized the documentary and disinterested testimony which entirely refutes this fiction and shows the real purpose of the various manipulations to have been to keep the property in the family under all circumstances. There is, therefore, no need to discuss the testimony again in this reply.

There is one matter, however, which we again call to this court's attention.

The appellees persist in arguing that Marvin Polakoff did not hold the property out to the creditors as part of his assets. This misleading argument deliberately overlooks the financial statement issued by Sam Polakoff on March 1, 1940, which listed this property as the most valuable asset of the business. [Pl's. Exhibit 7, R. 147-151.] The property is fully described in the itemized statement [R. 151] and there can be no question as to what was intended. The argument that the property was not held out to the creditors is therefore baseless and comes with ill grace.

II.

The appellees cite the case of *Fares v. Morrison*, 4 A. C. A. D. 1022, in support of their argument that the appellate court will not interfere with the conclusions of a trial court as to the weight of evidence. That principle is correct in the California state courts, but it has no application in an equity appeal before the federal courts.

In addition to the authorities quoted on pp. 20-21 of our main brief we quote the following from *Aro Equipment Corporation v. Herring-Wissler Co.*, 8 Cir., 84 Fed. 2d 619, 621:

“An appeal in equity brings before the appellate court the whole record, and the court is required to

examine the record and try the case *de novo*. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court, even though supported by substantial evidence.”

Such a rule is particularly applicable in this case, where the appellant’s case is supported by the documentary and disinterested evidence. The trial court’s opportunity to observe the witnesses and their demeanor, which is frequently given as the reason to affirm findings based upon conflicting evidence, does not apply in this case.

III.

We readily concede that a trustee in bankruptcy cannot attack a conveyance of property which the bankrupt held in trust for another person.

But that principle has no application herein. Marvin Polakoff never held the property in trust for Ivan Polakoff. It was property owned by Marvin for the Polakoff family, just as the wine distributing business was so owned and conducted. The creditors of the business are therefore entitled to look to the property for a satisfaction of their just claims.

Respectfully submitted,

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